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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

In the absence of any statutory range or restriction on the magnitude of the penalty that may be imposed for "bad faith" refusal to pay an insurance claim, the District Court assessed a $500,000 punitive damage judgment for acts of mismanagement that violated a substantive rule of conduct announced by the Mississippi courts after petitioner's conduct had occurred. The Court of Appeals affirmed in an opinion which, over the dissent of four judges voting to hear the case *en banc*, left to this Court the ultimate resolution of the questions:

1. Whether the Due Process Clause of the Fourteenth Amendment acts as a check on the discretion of juries and judges to award punitive damages in the absence of any express statutory limit and, if it does, what due process restrictions are imposed by that Clause; and

2. Whether the Contracts Clause applies to judicial action and whether, if it does, that Clause or the Due Process Clause of the Fourteenth Amendment prohibits the retrospective imposition of punitive damages for violation of a substantive standard of conduct that was created by judicial decision subsequent to the conduct for which the punishment was imposed.*

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* All the parties to this case are named in the caption. Pursuant to Rule 29.1, petitioner Reserve Life Insurance Company is the wholly owned subsidiary of Consolidated Investment Services, Inc., which is in turn the wholly owned subsidiary of Sammons Enterprises, Inc., which is owned by the Estate of Charles A. Sammons. Petitioner has no other parent or non-wholly owned subsidiary or affiliate.

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IN THE

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OCTOBER TERM, 1989

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RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reserve Life Insurance Company ("Reserve") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. That court affirmed a judgment of $500,000 in punitive damages and $1,000 in compensatory damages imposed after a bench trial. In doing so, that court expressly reserved to this Court the resolution of Reserve's contention that the Due Process Clause acts as a check on punitive damage awards imposed in the absence of statutory limits.

OPINIONS AND ORDERS BELOW

The opinion of the Fifth Circuit affirming the judgment of the District Court and expressly rejecting Reserve's federal constitutional challenges to the $500,000 punitive damage award is reported at 881 F.2d 1355 and is reproduced in App. A, 1a-28a. The January 16, 1990 order of that court denying Reserve's Petition for Rehearing and

Suggestion for Rehearing En Banc is unreported and is reproduced in App. B, 29a-30a. The opinion of the United States District Court for the Northern District of Mississippi imposing $1,000 in "extracontractual compensatory damages" and $500,000 in punitive damages is reported at 682 F. Supp. 1355 and is reproduced in App. C, 31a-70a. The District Court's May 20, 1988 order denying Reserve's Motion to Reconsider, to Alter, or to Amend Judgment is unreported and is reproduced in App. D, 71a. The judgment of the District Court was issued on May 18, 1988, is unreported and is reproduced in App. E, 72a. The opinion dissenting from the denial of Reserve's Suggestion for Rehearing *En Banc* issued on February 9, 1990, is unreported and is reproduced in App. F, 73a-90a.

JURISDICTION

The September 5, 1989 decision of the court below expressly rejected each of Reserve's federal constitutional challenges to the punitive damage award. That court denied Reserve's Petition for Rehearing and Suggestion for Rehearing En Banc on January 16, 1990. This petition is being filed within thirty days of the denial of the rehearing petition. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

2. The Contracts Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part:

> "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

STATEMENT OF THE CASE

A. Statement of Facts

This case arose out of respondent's claim for medical benefits under a contract of insurance issued to her by Reserve on January 5, 1983. Eighteen days later, respondent was admitted to the hospital. On the hospital admission sheet, respondent's physician noted that her "chief complaint" was "[p]ain in the lower abdomen," which had been "present in period . . . *for the last 2-3 years*. This attack started about three days ago and has become progressively worse." App. A, 2a, 881 F. 2d, at 1356 (emphasis added by court). The physician's admitting diagnosis indicated respondent was suffering from acute pelvic inflammatory disease.

A sonogram performed during her hospitalization suggested a possible cyst, endometriosis and pelvic inflammatory disease. A total hysterectomy was performed on respondent on the sixteenth day of her hospitalization. The physician's discharge summary referred again to acute pelvic inflammatory disease but also noted the presence of other conditions, including peritonitis, cysts, chronic cervicitis and massive adhesions—indicating that respondent suffered from endometriosis, a chronic condition which "may be present for some time without the patient being aware of it." App. C, 34a & n.1, 682 F. Supp., at 1357 & n.1.

On March 23, 1983, respondent submitted a claim for $6.658.35 in medical expenses. On June 2, 1983, Reserve initially denied the claim as resulting from treatment for a "pre-existing illness which was not covered by the terms of the policy." App. A, 3a, 881 F.2d, at 1356. This denial was based upon the statement in respondent's hospital admission sheet that she had been suffering lower abdominal pain "for the last 2-3 years."

Although respondent's initial requests for an explanation of the denial of her claim went unanswered due to clerical errors and bureaucratic confusion, Reserve wrote to

respondent on December 13, 1983, informing her that, unless her physician amended the hospital admission sheet to revise his statement that she had been experiencing severe abdominal pain "for the last 2-3 years," it could not consider payment of the claim.

The District Court found that over seven months thereafter—on July 23, 1984—respondent's attorney mailed to Reserve a letter which enclosed an affidavit of her physician stating that the hospital admission sheet was incorrect and that "the phrase '2-3 years' should read '2-3 days.' " App. C, 38a-39a, 682 F. Supp., at 1359. In deposition and at trial, however, the physician testified that the hospital admission sheet was in fact correct. He disclaimed any recollection of signing an affidavit to the contrary. T. 89-90, App. G, 91a. Also at trial, the manager of Reserve's major medical unit testified that Reserve was slow in matching incoming mail with the appropriate claim file but that all mail was logged in immediately upon receipt. He testified that the logs contained no record of receipt of the July 23, 1984 letter or the affidavit. T. 172-73, 180-81, App. H, 92a-93a.

The District Court, notwithstanding this direct, uncontradicted testimony, concluded that "the management of the claims department leads the court to conclude that the letter and the affidavit . . . were in fact received and then lost." App. C, 39a n.3, 682 F. Supp., at 1359 n.3. The Court of Appeals refused to disturb this finding, stating that "we cannot say that [it] is clearly erroneous." App. A, 13a n.1, 881 F.2d, at 1361 n.1.

The District Court determined that a number of the delays and the misplacing of respondent's medical records by Reserve in the processing of her claim were attributable to management deficiencies at Reserve during the relevant period:

> Unbeknownst to the public, Reserve Life was by mid-1983 experiencing severe organizational problems. Due to the unexpected success of a recently offered insurance policy, numerous

> claims were being received by Reserve Life in addition to the normal number of claims. The employees, faced with the task of matching claim correspondence with policyholders' files, often lost documents or were unable to find and file them for weeks at a time. Although the company has since computerized its operations, claims submitted in 1983 were often processed manually and mishandled.

App. C, 35a-36a, 682 F. Supp., at 1358.

On October 4, 1985, respondent filed an action seeking contractual damages, extracontractual compensatory damages for mental anguish, and punitive damages "for gross negligence or reckless disregard . . . in failing to pay her insurance claim." App. A, 8a, 881 F.2d, at 1358-59. During discovery, the affidavit of respondent's physician stating that she had experienced abdominal pain for "2-3 days"—not "2-3 years"—before her hospitalization was produced. After reviewing that affidavit, Reserve paid respondent's claim in full on June 16, 1986. Despite this payment, respondent continued to pursue her claims for extracontractual and punitive damages.

Also during discovery, Reserve obtained respondent's complete hospital records, including the final report of the hospital's pathologist. The physician to whom Reserve submitted these records for expert consultation concluded that respondent's condition was, indeed, attributable to endometriosis—a chronic condition—and a bilateral infection caused by *chronic* pelvic inflammatory disease. App. C, 41a-42a, 682 F. Supp., at 1361. These conclusions were fully consistent with the statement in the admitting diagnosis that respondent had been experiencing severe abdominal pain "for the last 2-3 years."

On the basis of its expert's medical opinion, Reserve asserted below that it had an arguable basis upon which to deny respondent's claim and that, under Mississippi law, punitive damages were therefore not permitted. The Court of Appeals, as had the District Court, accepted Reserve's

contention that it had an arguable basis to deny the claim based upon "the final report of the hospital pathologist," but concluded that punitive damages were still appropriate because Reserve did not have the records supporting its refusal at the time the claim was denied. In response to Reserve's argument that it would still have denied the claim even if it had obtained the records earlier, the Court of Appeals held that "it was the delay by Reserve Life in properly investigating [the] claim which caused the injury to [respondent], not the denial of the claim itself." App. A, 17a n.3, 881 F.2d, at 1363 n.3.

B. The Decisions Below

In attempting to apply Mississippi's "bad faith" law to this case, the District Court concluded that "the rules derived from the [Mississippi Supreme Court's insurance bad faith] cases have often appeared inconsistent or contradictory." App. C, 49a, 682 F. Supp., at 1364. The District Court nevertheless discerned that Reserve would be liable for bad faith and punitive damages if it had not made "reasonable efforts to obtain *all* available medical information relevant to the claim." *Id.*, 54a, 682 F. Supp., at 1366 (emphasis added). Although the District Court's derivation of this legal standard was ostensibly based upon its extensive analysis of four decisions of the Supreme Court of Mississippi, the legal standard it articulated was lifted virtually verbatim from one of those cases, *Bankers Life and Casualty Co.* v. *Crenshaw*, 483 So. 2d 254, 272 (Miss. 1985), *aff'd on other grounds*, 108 S. Ct. 1645 (1988), which had been decided after the conduct for which Reserve was held liable in the instant case.[1] Based upon that

[1] The only authority cited by the *Crenshaw* court to support this standard, 483 So. 2d, at 272, was a treatise, 15A *Couch on Insurance* § 58.10, at 277 (2d ed. 1983); that treatise cited no Mississippi case. Of the other three cases analyzed by the District Court, *Reserve Life Insurance Co.* v. *McGee*, 444 So. 2d 803 (Miss. 1983), was said to be "factually distinguishable," App. C, 57a, 682 F. Supp., at 1368, and in any event did not lay down any rule requiring an insurance company to make "reasonable efforts to obtain all available medical information relevant to a claim." This understanding of *McGee* is required both by

standard, the District Court concluded that "[a] 'reasonable effort' to obtain 'all available medical information' was not made in the instant case," App. C, 66a-67a, 682 F. Supp., at 1372, and held that punitive damages were warranted as a matter of substantive Mississippi law.

In establishing the $500,000 penalty, the District Court first found that the record did not support a finding of malice by Reserve. Rather, that court concluded, Reserve's negligent conduct must instead have been motivated by a desire "to save money by denying a claim." Specifically, the court stated that

> organizational mismanagement and lack of adequate supervision over claims personnel resulted in a wrongful denial of [respondent's] claim. The recent installation of a computer system may have resolved a lot of [Reserve's] problems, but the egregious wrong committed in this case remains.

App. C, 68a, 682 F. Supp., at 1373. In short, the cause of Reserve's misconduct was organizational mismanagement.

The District Court also focused upon "one prior instance where Reserve Life was assessed punitive damages in this state"—*Reserve Life Insurance Co.* v. *McGee*, 444 So. 2d 803 (Miss. 1983), in which a $158,000 award had been imposed. Because the manager of Reserve's major medical claims unit was not familiar with the *McGee* case, the court concluded that that award "did not get the attention of Reserve . . . ." App. C, 68a, 682 F. Supp., at 1373. In the name of punishing the wrong in this case, deterring similar conduct by Reserve in the future, and rewarding

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the opinion in *McGee* and by the second of the other two cases discussed by the District Court, *Blue Cross and Blue Shield* v. *Campbell*, 466 So. 2d 833 (Miss. 1984). In *Campbell*, as acknowledged by the District Court below, the Supreme Court of Mississippi "appears to place a duty on the hospital in insurance cases to submit complete and unambiguous records . . . ." App. C, 60a, 682 F. Supp., at 1369. The third case, *Life Insurance Co.* v. *Allen*, 518 So. 2d 1189 (Miss. 1987), simply reiterated the rule laid down in *Crenshaw*.

respondent for "protecting the public from future wrongdoing," *id.*, 682 F. Supp., at 1372, the District Court added $500,000 to the cost of Reserve's new computer system by the following "reasoning":

> Reason and logic must govern the calculation of any punitive damage award. In the instant case, Reserve Life has tendered a financial statement listing its net worth at roughly $157,000,000.00. The plaintiff has chosen not to challenge this figure.
>
> Based on the circumstances of this case, the court finds that the plaintiff is entitled to an award of punitive damages in the amount of $500,000.00. This figure is roughly three times that awarded in [*Reserve Life Insurance Co. v.*] *McGee* [$158,000], but substantially less than the awards affirmed in *Wesson* and *Crenshaw*. The objectives of punishment and deterrence are served, and the plaintiff is amply rewarded for bringing a wrongdoer to account. The court is confident that this award will get the attention of Reserve Life and other insurance company officials.

Id., 69a, 682 F. Supp., at 1373.[2]

On appeal, the Court of Appeals panel accepted the principle that in Mississippi, "an insurance company must make 'reasonable efforts' to obtain all available medical information relevant to the claim. *See Life Insurance Co.* v. *Allen*, 518 So. 2d 1189 (Miss. 1987); *Bankers Life & Casualty Co.* v. *Crenshaw*, 483 So. 2d 254, 271-73 (Miss.

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[2] In *Mutual Life Insurance Co. of New York* v. *Wesson*, 517 So. 2d 521 (Miss. 1987), *cert. denied*, 108 S. Ct. 2035 (1988), a punitive damage award of $1,500,000 had been imposed; in *Crenshaw*, an award of $1,600,000 had been imposed. Neither the parties nor the conduct involved in *Wesson* and *Crenshaw* bore any relationship to the parties and conduct in the instant case.

1985)." App. A, 15a, 881 F.2d, at 1362.[3] Although that court concluded that Reserve had an arguable basis upon which to deny the claim upon review of the hospital records after this litigation had been initiated, it held that, under Mississippi law, "an insurance company may not delay investigation of a claim for a significant period of time and then . . . rely on the arguable basis" that it was able to predicate on after-discovered facts. App. A, 14a, 881 F.2d, at 1362.

In addressing Reserve's Due Process Clause challenge to punitive damage awards imposed in the absence of statutory standards and restrictions, the Court of Appeals panel sidestepped the issue:

> [W]e specifically decline to resolve the difficult issue of whether the Due Process Clause acts as a check on the discretion of a trier of fact to impose punitive damages in the absence of any statutory limits; instead, we conclude that, assuming the Due Process Clause so limits the imposition of punitive damages, on the facts of the instant case, due process was not violated by the $500,000 punitive damage award . . . .

App. A, 18a, 881 F.2d, at 1363. After discussing Justice O'Connor's separate opinion in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct., at 1655-56, and Justice Brennan's concurring opinion in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989), the Court of Appeals panel went on to state its belief that "a definitive resolution of this highly controversial issue is not foreseeable in the near future" based upon this Court's denial of certiorari in *Metromedia, Inc.*

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[3] After citing to *Allen* and *Crenshaw*, the court added a "*See generally*" citation to *Reserve Life Insurance Co.* v. *McGee*, 444 So. 2d 803 (Miss. 1983). As demonstrated in note 1, *supra*, *McGee* did not establish the "reasonable efforts" standard and, as the District Court itself recognized, the decision in *Blue Cross and Blue Shield* v. *Campbell* in 1984 had placed the burden on the *hospital* to provide all the records required by an insurance company in order to process a claim.

v. *April Enterprises, Inc.*, *cert. denied*, 109 S. Ct. 3242 (1989), *Goodyear Tire & Rubber Co.* v. *Hodder*, *cert. denied*, 109 S. Ct. 3265 (1989), and *Cudahy Co.* v. *Miller*, *cert. denied*, 109 S. Ct. 3265 (1989). App. A, 21a, 881 F.2d, at 1365.

Having so qualified its inquiry, the Court of Appeals panel appeared to reject summarily Reserve's due process claim that it had not had adequate, advance notice of the burden on it to "make reasonable efforts in obtaining all relevant medical information regarding the claim of an insured for health benefits." App. A, 23a, 881 F.2d, at 1366. This conclusion was apparently based upon the court's prior citations to the 1987 and 1985 decisions in *Allen* and *Crenshaw*, both of which post-dated Reserve's conduct, and *McGee*, which did not establish that standard of conduct. *See* notes 1 & 3, *supra*.

The Court of Appeals panel then turned to consideration of the size of the $500,000 punishment. In doing so, the court observed that in Mississippi the amount of punitive damages is to be determined by reference to the following factors:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future;
>
> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses;
>
> (3) The pecuniary ability or financial worth of the defendant;
>
> (4) The degree of the offense;
>
> (5) The presence or absence of malice;
>
> (6) The motive behind the actions;
>
> (7) The injury intended;

(8) The public sense of justice and propriety; and

(9) The need to encourage plaintiffs to bring similar actions to deter similar acts of wrongdoing.

See App. A, 25a, 881 F.2d, at 1366-67. Noting that "it would be far more appropriate for the Mississippi legislature—not this court—to set forth any more exact proportionality guidelines for punitive damages in Mississippi," *id.*, n.5, 881 F.2d, at 1367 n.5, the court focused on the District Court's application of several of this potpourri of factors to the "record." Specifically, the Court of Appeals panel noted that the District Court had drawn "special attention to the fact that the punitive damages previously imposed upon Reserve Life in *McGee*"—Reserve's only previous punitive damage exposure in Mississippi—"apparently 'did not get the attention of Reserve Life and had little, if any, deterrent effect.' " *Id.*, 25a, 881 F.2d, at 1367. The court observed that the District Court had found no malice by Reserve but, rather, a general approach to business motivated by a desire "to save money." That court also noted that the District Court had taken into account Reserve's net worth of $157,000,000. With these three factors in mind, the Court of Appeals panel concluded: "[W]e cannot say that the district court erred in its application of Mississippi substantive law on punitive damages to the facts of this case." *Id.*, 26a, 881 F.2d, at 1367.

Based upon its conclusion that the District Court had correctly applied Mississippi's punitive damage "factors," the Court of Appeals panel further concluded that the Due Process Clause *a fortiori* had not been violated: "[W]e conclude that the guarantees . . . [of] the Due Process Clause were not violated on the facts of the instant case." *Id.*, 881 F.2d, at 1367. What those "guarantees" might be were not explained; rather, the court reiterated that it was "specifically declin[ing] to address whether the Due Process Clause may ever constrain the imposition of punitive damages in a civil case brought by private parties." *Id.*, 881 F.2d, at 1367 (footnote omitted).

Finally, in a footnote the Court of Appeals panel rejected Reserve's other constitutional challenges as follows:

> Reserve Life additionally contends that the imposition of the $500,000 in punitive damages (1) violates the constitutional prohibition against ex post facto laws, (2) impairs its right to contract in violation of the federal and Mississippi constitutions, and (3) chills the fundamental right of access to the courts as guaranteed by the federal and Mississippi Constitutions. The ex post facto claim is without merit as acceptance of such an argument would effectively transform all evolving standards of conduct in negligent [sic] cases to ex post facto laws. The contracts clause argument fails as the clause only applies to actions by the legislative authority of a state, not its judiciary. *Frazier v. Lowndes County*, 710 F.2d 1097, 1099 (5th Cir. 1983). Finally, the imposition of punitive damages does not chill the right of a litigant to access the courts as Mississippi only imposes punitive damages on an insurer who acts with gross negligence and denies a claim with no arguable basis, not on insurers who only mistakenly deny claims.

App. A, 26a-27a n.6, 881 F.2d, at 1367 n.6.

In an opinion issued on February 9, 1990, Judge Jones, joined by Judges Gee, Jolly and Smith, dissented from the denial of Reserve's Suggestion for Rehearing *En Banc*. Judge Jones concluded that neither Reserve nor other insurance companies which had "been attacked by this new Mississippi tort have had adequate notice of the conduct that could result in punitive damage awards" and that, therefore, "Mississippi's bad faith refusal tort . . . mocks our notions of fundamental fairness embodied in the Due Process Clause . . . ." App. F, 74a. Recognizing that a majority of this Court has "questioned the constitutional propriety of punitive damage awards run amok," *id.*, Judge Jones surveyed the pertinent Mississippi cases and observed that under their "non-rule of law," the Supreme

Court of Mississippi "has repeatedly authorized punishment for failure [of a litigant] to abide by [that court's] intentions," App. F, 78a, as distinct from articulated rules of conduct. She ultimately concluded that, "[a]s to the standard for imposing liability, Mississippi bad faith refusal law is a predator lurking in the shadows to pounce on the unsuspecting" and that Reserve is only one of many victims of such attacks. App. F, 84a. Judge Jones also laid bare the myth perpetuated by the panel that the various "controls" over the size of punitive damage awards articulated by the Mississippi courts comport with even the most constricted concept of due process. As she put it, "[t]he judicial hands-off policy on punitive damages assures that no unifying principle can or will emerge from the penalties inflicted upon insurance companies." App. F, 87a.

REASONS FOR GRANTING THE WRIT

The constitutional objections to punitive damages presented by Reserve must ultimately be decided by this Court. They raise today, more so than in 1986, "important issues which, in an appropriate setting, must be resolved . . . ." *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). In *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645, 1651 (1988), the Court challenged the state legislatures and the lower courts to address the problem of increasingly frequent and explosively larger punitive damage awards before intervention by this Court. The legislatures by and large have not responded, and state courts continue to enter and affirm punitive damage awards as if this Court's concerns had never been articulated.

A. The Lower Federal And State Courts Look To This Court To Resolve These Questions

Federal courts sitting in diversity, as in the case at bar, are not free to address these important issues as a policy matter. State courts, which are largely responsible for creating and perpetuating these punitive damage systems,

could reform those systems without any reliance on the federal constitution. The courts below, however, were obliged to apply Mississippi's substantive law as it came to them. The lower federal courts may, of course, apply the federal constitution to the punitive damages systems of the States; indeed, as an original matter they are required to do so.

Yet, the Courts of Appeals seem to be in a state of paralysis in dealing with the constitutional implications of punitive damage awards. This paralysis manifests itself in two ways. First, Courts of Appeals cling to their own precedents decided decades before serious federal constitutional objections to arbitrary and excessive punitive damage awards were advanced in and legitimated by this Court in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Thus, in *Racich* v. *Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989), the Second Circuit could not "write upon a clean slate" on the due process issue because a twenty-two year old decision of that court had considered and *implicitly* rejected an apparently similar claim.[4]

Second, no federal Court of Appeals appears to want to be the first to decide these substantial due process questions. As the court below put it, "no circuit court has yet ruled on this issue" and "we need not become the first court to resolve this challenging inquiry." App. A, 21a-22a, 881 F.2d, at 1365. The Ninth Circuit likewise brushed off a due process challenge with the observation that, "[u]nder *current* constitutional standards, the jury's discretion regarding punitive damages is not subject to strict fetters. 'Jury discretion over the amounts awarded is limited only by the gentle rule that [punitive damages] not be excessive.' "[5]

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[4] *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 835, 841-42 (2d Cir. 1967).

[5] *Kraus* v. *Santa Fe Southern Pacific Corp.*, 878 F.2d 1193, 1200 (9th Cir. 1989) (emphasis added), *quoting Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), *cert. dism'd*, 110 S. Ct. ___ (Jan. 17, 1990) (No. 89-760).

The inertia in the federal Courts of Appeals is in no small part attributable to the tension between the statements of this Court and individual Justices regarding the substantiality and importance of these issues, on the one hand, and the actions of this Court in cases coming to it in which these questions have been presented, on the other. As the Court of Appeals panel observed in this case, Justice O'Connor identified the precise due process issues presented here in her concurring opinion in *Bankers Life and Casualty Co.* v. *Crenshaw*, where, joined by Justice Scalia, she observed that "the amount of the penalty that may ensue [after liability for punitive damages is established under Mississippi law] is left completely indeterminate . . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." 108 S. Ct., at 1655-56 (citations omitted), *quoted in* App. A, 20a, 881 F.2d, at 1364.

The court below went on to observe that in *Browning-Ferris*, Justice Brennan, joined by Justice Marshall, had voiced similar concern that, "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." 109 S. Ct., at 2923 (Brennan, J., concurring), *quoted in* App. A, 21a, 881 F.2d, at 1365. The court below failed to note that Justice O'Connor, joined by Justice Stevens, expressly associated herself with Justice Brennan's views and also expressly adhered to her prior statements in *Bankers Life*, *see Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring in part and dissenting in part)—bringing to five the number of Justices voicing their concern regarding punitive damages in this context. The court nevertheless was impressed that these statements did not appear to be reinforced by action. Thus, the court below observed that "a definitive resolution of this highly controversial issue is not foreseeable in the near future" based upon this Court's denial of the petitions in *Metromedia*, *supra*, *Good-*

year, *supra*, and *Cudahy*, *supra*, shortly after the decision in *Browning-Ferris*. App. A, 21a, 881 F.2d, at 1365.

The court below accurately forecast in its September 5, 1989 decision in this case that the tension between this Court's statements and its actions was not to be relieved "in the near future." On November 6, 1989, the Court denied petitions in several cases, including *Clardy* v. *Sanders*, 110 S. Ct. 376 (1989) (No. 89-440), and *Combined Insurance Co. of America* v. *Ainsworth*, 110 S. Ct. 376 (1989) (No. 89-282), in which these due process questions were presented and in which stays previously had been granted by the Court and Justice O'Connor, respectively. These petitions were denied over the dissent of Justice White who, by dissenting, became the sixth Member of this Court to express an interest in the resolution of these questions.

The federal district courts are in similar disarray. On February 1, 1990, a federal district court—after full briefing of these constitutional issues in the post-trial motions—entered judgment on a $30,000,000 punitive damage award without any reference to these issues other than the statement that "[t]his court has carefully considered each post judgment motion . . . ." *Brooks* v. *Hilton Casinos, Inc.*, No. CV S-84-436 RDF (D. Nev. Feb. 1, 1990). Other courts have expressly found *Browning-Ferris* to be dispositive authority against applying the Due Process Clause to punitive damage awards. For example, in *Ay You Man* v. *Raymark Industries*, Nos. 87-14524, 87-14470 (D. Hawaii Nov. 16, 1989), the District Court rejected a broad due process challenge to the standardless imposition of punitive damages, stating that it did "not find that the [United States] Supreme Court has given any indication that punitive damages are unconstitutional as a matter of law and this court will not extract such a doctrine from defendants' inaccurate interpretation of Court dicta." Slip op., at 4. That court also noted this Court's recent denial of certiorari in *Volkswagen of America, Inc.* v. *Gibbs*, 110 S. Ct. 418 (1989) (No. 89-228), and concluded from that denial that "there is no reason to assume the Court considers the

issue to be pressing." Slip. op., at 4 n.2. Other similar post-*Browning-Ferris* federal cases abound.[6] Federal jury awards of excessive punitive damages since *Browning-Fer-*

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[6] *See In re Joint Eastern and Southern District Asbestos Litigation*, No. 87 Civ. 4483 (E.D. & S.D.N.Y. Oct. 24, 1989), slip op., at 2 ("Celotex's challenges to the punitive damages award are also unavailing .... [T]he constitutionality of punitive damages awards has recently been affirmed. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989)."); *Guarino* v. *Armstrong World Industries, Inc.*, No. 88-1087 (S.D. Fla. Oct. 13, 1989), slip op., at 4 & n.3 (rejecting due process challenges to multiple punitive damage awards and to vague standards, because, *inter alia*, "the Supreme Court has long held state regulation in the economic realm to be immune from due process invalidation, where the state has a valid basis for its regulation"); *Hart* v. *Armstrong Cork Co.*, No. S79-0033 (S.D. Miss. Sept. 13, 1989) (consolidated cases), slip op., at 9 ("The defendant's challenge [to Mississippi's punitive damage standards] appears particularly unpersuasive in light of the United States Supreme Court's decision in *Smith* v. *Wade*, 461 U.S. 30 (1983)."); *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (multiple awards of punitive damages for same act violate due process but lower courts are "powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated" until "there is uniformity either through [United States] Supreme Court decision or national legislation."); *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 280 (D.N.J. 1989) (rejecting due process challenge to the standardless discretion of juries to award punitive damages because, *inter alia*, "the United States Supreme Court's decision in *Smith* v. *Wade*, 461 U.S. 30 (1983), puts to rest any question regarding the vagueness" of the punitive damage "standards" established by New Jersey law).

Shortly after the Court granted review in *Browning-Ferris* in December 1988, a federal district court affirmed a $7,000,000 punitive damage award in *Kociemba* v. *G.D. Searle*, 707 F. Supp. 1517, 1536 (D. Minn. 1989) ("The United States Supreme Court has stated that 'punitive damages have long been a part of traditional state tort law.' *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). This Court finds that allowing a jury to assess punitive damages without a set maximum amount or rigid standard does not violate due process."), and in *Williams Pipe Line Co.* v. *City of Mounds View*, 704 F. Supp. 914, 921 (D. Minn. 1989), the district court rejected a federal due process challenge to the imposition of punitive damages because defendant "has not cited any case holding this old and often-sought remedy unconstitutional."

ris are consistent with the judicial attitudes expressed in the foregoing opinions.[7]

At the end of the day, perhaps the Second Circuit has captured as well as possible the reluctance of the lower federal courts to march into this new constitutional terrain. More than three months after this Court's decision in *Browning-Ferris*, that court refused to tread into what is so obviously this Court's domain:

> [W]e are here asked to hold, in effect, that the common-law standards applied by the [state] courts . . . for imposition of punitive damages are unconstitutional, and that our own cases applying that law were in error . . . . This would be a far-reaching holding indeed . . . . Under all the circumstances, we believe that such a step, if it is to be taken . . . is best left for . . . higher judicial authority.

Racich v. *Celotex Corp.*, 887 F.2d, at 399.

State courts, otherwise empowered but disinclined to reform their punitive damage systems as a matter of state law, likewise continue to look to this Court for an authoritative resolution of these constitutional questions.

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[7] Since *Browning-Ferris* was decided, federal juries have assessed numerous large punitive damage awards. *See, e.g., First Options of Chicago, Inc.* v. *Polonitza*, 88 C 2998 (N.D. Ill. Jan. 24, 1990) (jury verdict of $1,500,000 punitive damage award in fraudulent stock trading suit); *Serrano* v. *Schmidt*, Nos. 88-4528, 89-09875 (C.D. Cal. Jan. 24, 1990) (total of $496,000 in punitive damages assessed against three individual county sheriffs in § 1981 action); *Keenan* v. *City of Philadelphia*, No. 88-7156 (E.D. Pa. Jan. 18, 1990) ($1,800,000 punitive damage award in sex discrimination case); *Layman* v. *Xerox Corp.*, No. CA3-87-1733-D (N.D. Tex. Jan. 9, 1990) ($8,750,000 punitive damage award for state common law fraud arising out of age discrimination claim); *In re Korean Air Lines Disaster of Sept. 1, 1983*, M.D.L. 565 (D.D.C. Aug. 2, 1989) (jury imposed $50,000,000 punitive damage award against airline for "willful misconduct" in air disaster); *Advanced Medical, Inc.*, v. *Arden Medical Systems, Inc.*, No. 87-3059 (E.D. Pa. June 30, 1989) ($7,150,000 punitive damage award for "tortious interference with contractual relations").

After noting that the due process question had been left open in *Browning-Ferris*, on August 30, 1989 a California Court of Appeal rejected a federal due process challenge to a $2,500,000 punitive damage award, stating that although the "thrust of defendants' contentions is not without some persuasive force," "we think it appropriate to rely on *Downey Savings* [*and Loan Association* v. *Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988)] pending further action by the United States or California Supreme Courts." *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 798, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished; *see* note 12, *infra*). As put by a Maryland appellate court on June 9, 1989, after citing cases such as *Day* v. *Woodworth*, 54 U.S. (13 How.) 363 (1851), for this Court's "approval" of the punitive damage system, "[w]hat the Supreme Court has declared constitutional we may not put asunder . . . ." *Potomac Electric Power Co.* v. *Smith*, 79 Md. App. 591, 558 A.2d 768, 792 (Md. Spec. Ct. App. 1989) (affirming $7,500,000 punitive damage award).[8]

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[8] Similarly, on October 4, 1989, an Indiana appellate court—affirming a $1,000,000 punitive damage award for false imprisonment and malicious prosecution—observed:

> [P]unitive damages have long been recognized as comporting with the Fundamental Fairness Doctrine of the due process clause. *Missouri Pacific and R. Co.* v. *Humes* (1885), 115 U.S. 512. It is true . . . that Justice O'Connor recently commented in a recent opinion about punitive damages and due process protections. *See Bankers Life, supra.* However, the Supreme Court in that case and in a subsequent decision explicitly refused to consider the question. *See Browning-Ferris supra.* Thus, we cannot conclude that the punitive damage award here violated the fourteenth amendment of the United States Constitution.

Lazarus Department Store v. *Sutherlin*, 544 N.E.2d 513, 529-30 (Ind. App. 1989). *See also Simmons* v. *General American Life Insurance Co.*, No. 87-1339 (Ala. Dec. 22, 1989), slip op., at 16 ("this Court has consistently rejected the same [federal due process] arguments made by

From the moment this Court ordered briefing and argument of *Aetna Life Insurance Co.* v. *Lavoie* in June 1985, there has been no doubt that a decision to apply some *federal* constitutional limitations on the punitive damage systems would have "far-reaching" implications. Why that should be so is not the result of any inability in this Court to fashion measured, carefully tailored, constitutional restraints based upon historic analogs and this Court's modern due process jurisprudence. As Reserve shall demonstrate on the merits, such due process constraints are readily articulated and, once articulated, easily applied.

Rather, applying the Due Process Clause to the punitive damage system will be "far-reaching" because the punitive

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defendants and has upheld the constitutionality of punitive damages"; affirming $500,000 punitive damage award); *Olson* v. *Walker*, 781 P.2d 1015, 1022-23 (Ariz. App. 1989) ("neither the U.S. Supreme Court nor any Arizona court has decided whether more stringent procedures are necessary in private civil punitive damages actions to satisfy due process .... The punitive damage award does not violate due process."); *Hospital Authority of Gwinnett County* v. *Jones*, 386 S.E.2d 120, 125-26 (Ga. 1989) (rejecting defendant's claim that Georgia punitive damage statute permits standardless jury awards and therefore violates due process because "as a general rule, the size of the award for [punitive] damages ... is left to the enlightened conscience of impartial jurors, *subject to approval of the trial court*. The appellate court will not disturb the award absent an award so excessive or inadequate as to shock the judicial conscience"; affirming $1,300,000 punitive damage award) (citations omitted) (emphasis added by the court); *Stoner* v. *Nash Finch, Inc.*, 446 N.W.2d 747, 755-56 (N.D. 1989) (discussing *Browning-Ferris* and rejecting due process "void-for-vagueness" challenge to punitive damage award because "courts which have recently addressed similar arguments, *i.e.*, that various punitive damage schemes are unconstitutionally vague in defining conduct giving rise to liability and in providing standards for assessing the amount, have found no due process violation," and because statutory terms "oppression, fraud or malice" are sufficiently precise to survive due process scrutiny); *Douglas* v. *Bank of New England/Old Colony, N.A.*, 566 A.2d 939, 942 (R.I. 1989) ("Although New England raises a due process argument under the United States Constitution," this argument is "not persuasive in light of the fact that there is no showing that the trial justice's award ... constituted an abuse of ... the due process clause of the Federal Constitution .... *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.* ...") (affirming $225,000 punitive damage award).

damage system has, as put by Judge Jones in dissent in this case, "run amok." The prospect of enormous punitive damage awards invites every grievance into the courts in a torrent of litigation that, absent such bounties, would never be brought or would settle at an early stage. The stakes are high; as Justice O'Connor has observed, "[a]wards of punitive damages are skyrocketing" and the "threat of such enormous awards has a detrimental effect on the research and development of new products." *Browning-Ferris*, 109 S. Ct., at 2924. The availability of excessive punitive damage awards is widespread, and the lure of such "high-stakes gambling," App. F, 89a, is understandably seductive to plaintiffs and their lawyers.[9]

The need for this Court's intervention is manifest. What controls are put on the availability of punitive damages by the legislatures and courts one day may be removed the next. In 1987, the Montana legislature amended § 27-1-221 of the *Montana Code* to eliminate the limits the legislature had placed on the size of punitive damage awards several years before and to reinstate the rule of limitless punitive damages in Montana.[10] On December 21, 1989, the Supreme Court of Kentucky overruled its 1986 decision declaring that there was no right in Kentucky to

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[9] For example, a federal agency is currently before the Sixth Circuit attempting to sustain its theory, accepted by a district court for the first time, that the federal common law recognizes a right of action accompanied by unlimited punitive damages for the alleged "bad faith" refusal of an insurer to pay a claim pursuant to a fidelity bond issued to a bank subsequently taken over by that agency. *Aetna Casualty & Surety Co.* v. *Federal Deposit Insurance Corporation*, No. 89-5866 (6th Cir.) (argued Feb. 5, 1990) ($3,500,000 punitive damage award).

[10] Because punitive damage cases, as here, often involve a sympathetic local plaintiff and a large, out-of-state corporation, this Court's suggestion in *Bankers Life* that state legislatures might act responsibly on this subject must necessarily be tempered by "the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940).

recover punitive damages for "bad faith" failure to pay an insurance claim[11] and affirmed the imposition of punitive damages against an insurer based upon denial of a claim years before. *Curry* v. *Fireman's Fund Insurance Co.*, No. 88-SC-495-DG (Ky. Dec. 21, 1989). On December 29, 1989, a California Court of Appeal affirmed yet another eight-digit punitive damage award against an insurance company in an unpublished opinion in which it rejected due process challenges to that punishment, stating that it was bound by its own precedents and cases decided by the Supreme Court of California holding the California system constitutional. *G. Amador Corp.* v. *Ohio Casualty Insurance Co.*, No. B029795 (Cal. Ct. App. Dec. 28, 1989) (unpublished) ($10,000,000 punitive damage award), slip op., at 26-27.[12] Only the application of the federal constitution can bring the punitive damage system under some modicum of control.[13]

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[11] *Federal Kemper Insurance Co.* v. *Hornback*, 711 S.W.2d 844 (Ky. 1986).

[12] Ten copies of the unpublished opinion in *G. Amador Corp.* have been lodged with the Clerk of the Court simultaneously with the filing of this petition. The affirmance of seven- or eight-digit punitive damage awards in such "unpublished" opinions by California appellate courts has become routine, as has the refusal of the Supreme Court of California to accept review of such cases. *See, e.g., Eaton Corp.* v. *PKL Cos., cert. denied*, 109 S. Ct. 1933 (1989) (No. 88-1354) ($15,000,000 punitive damage award); *Metromedia, Inc.* v. *April Enterprises, Inc., cert. denied*, 109 S. Ct. 3242 (1989) (No. 88-625) ($14,000,000 punitive damage award). Because such decisions are "unpublished," it is entirely possible that there are other similar awards affirmed by the California Courts of Appeal that are inaccessible to the public and the bar because of California's peculiar official censorship policy. As illustrated by *George* v. *International Society for Krishna Consciousness, supra*, this censorship policy is sometimes enforced by the Supreme Court of California after a Court of Appeal has ordered its opinion to be published. Under Rule 977 of California's Rules of Court, such unpublished or depublished opinions may generally not be cited or relied upon by litigants. This practice further aggravates the *ad hoc* and utterly unpredictable nature of punitive damages.

[13] Since the decision in *Browning-Ferris*, state court juries have, like their federal counterparts, *see* note 7 and accompanying text, *supra*,

B. The Questions Whether And In What Manner The Due Process Clause Checks The Award Of Punitive Damages Are Important And Should Be Reviewed By The Court

Reserve has been punished severely for regrettable lapses in its management systems. There was no malice in its failure to respond more efficiently to respondent's claim. Indeed, had Reserve acted more expeditiously to obtain and review the pathology report—later acknowledged by the courts below to create an arguable basis for rejecting respondent's claim—shortly after the claim was

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continued to return, and state courts have continued to affirm, excessive punitive damage awards. In addition to the cases discussed in the text above and earlier in this petition, Reserve has identified the following post-*Browning-Ferris* verdicts in state courts: *Larry Hunt Automobile Co.* v. *McCormick Laguna Beach Mortuary*, No. 44-81-43 (Super. Ct., Orange Co., Cal. Jan. 8, 1990) ($1,075,000 punitive damage award imposed against mortuary and mortuary owner for "damaging business" of auto shop by failing to control crematorium fumes); *Alling* v. *Universal Manufacturing Corp.*, No. 589999-3 (Super. Ct., Alameda Co., Cal. Dec. 20, 1989) ($7,500,000 punitive damage award for fraud and "interference with plaintiff's advantageous business relationships"); *Clark* v. *State Farm Fire & Casualty Ins. Co.*, No. WEC 094395 (Super. Ct., Los Angeles Co., Cal. July 17, 1989) ($25,000,000 punitive damage award in insurance bad faith action); *Banco do Brasil, S.A.* v. *Latian, Inc.*, No. C 532 005 (Super. Ct., Los Angeles Co., Cal. July 12, 1989) ($22,000,000 punitive damage award imposed against bank and $500,000 imposed against bank officer for fraud in lender liability suit); *Zalay* v. *Dooley*, No. 0079-7614-017 (Cir. Ct., Pinellas Co., Fla. Sept. 12, 1989) ($25,050,000 in punitive damages imposed for libel and slander); *Ennia General Insurance Co.* v. *Commercial Marine Underwriters Inc.*, No. 84-19946 (CA06) (Cir. Ct., Dade Co., Fla. Aug. 10, 1989) ($2,700,000 in punitive damages imposed for fraud, breach of fiduciary duty and conversion); *Eulrich* v. *Snap-On Tools Corp.*, No. 88-0708 (Cir. Ct., Linn Co., Or. Nov. 20, 1989) ($8,450,000 punitive damage verdict in fraud and breach of contract action); *Adegbite* v. *Toyota Motor Sales USA, Inc.*, No. 84-44359 (Dist. Ct., Harris Co., Tex. Dec. 29, 1989) ($25,000,000 punitive damage award in products liability action); *Sims* v. *Kaneb Services, Inc.*, No. 86-02474 (Dist. Ct., Harris Co., Tex. Dec. 1, 1989) ($19,000,000 punitive damage award in wrongful discharge and malicious prosecution action); *Eanes* v. *Charter Medical Corp.*, No. C-4260-87-F (Dist. Ct., Hidalgo Co., Tex. Jan. 19, 1989) ($3,364,000 in punitive damages in wrongful discharge action).

filed, it might never have paid the claim and its decision might have gone unchallenged or might have been upheld in court. In no event would it have been punished under those circumstances. Over the past decade, however, the negligent failure to conduct business at maximum efficiency has become the stuff of countless lawsuits brought by plaintiffs and their lawyers seeking a chance to strike it rich in the punitive damage lottery.

Had Reserve committed willfully deceptive acts against respondent and been convicted under pertinent Mississippi statutory law, *Miss. Code Ann.* § 83-5-85 (1972 & Supp. 1989), Reserve could have been fined a maximum of $1,000. (As of January 1, 1987, the penalty for that offense was increased to a maximum of $5,000. *Id.*) The District Court, however, proceeded without any explicit direction from the Mississippi legislature regarding the amount of punishment it could impose. Mississippi, as most jurisdictions, has "no hard and fast rule [establishing] the maximum amount of punitive damages which may be awarded in a given case." *Bankers Life and Casualty Co.* v. *Crenshaw*, 483 So. 2d, at 279. In fact, Mississippi has virtually no rule at all, instead committing the amount of punitive damages solely to the discretion of the trier of fact. *Id.*, at 278-79.

Without any express statutory range of punishment having been supplied to it, the District Court began its evaluation by reciting the diverse factors previously articulated by the Mississippi courts while presumably recognizing that no one of those factors should be "emphasize[d] . . . above the others . . . ." *Mutual Life Insurance Co. of New York* v. *Wesson*, 517 So. 2d, at 532. This collection of factors, however, does not itself yield any particular number or even a range of numbers, so the court looked elsewhere to get its bearings. One number relied on by the court was the $158,000 punitive damage award imposed against Reserve by a jury and upheld by the Supreme Court of Mississippi in 1983 in *McGee*. As the opinion in *McGee* discloses, the size of an award of punitive damages in Mississippi is to be regarded by an appellate court as presumptively correct and disturbed only "for exceptional

causes." 444 So. 2d, at 812 (citations omitted). The District Court also looked to Reserve's net worth of $157,000,000. On those bases, the court apparently pulled the figure $500,000 out of the air and then observed that while that figure was roughly three times greater than the punishment sustained in *McGee*, it was substantially less than the $1,500,000 and $1,600,000 punishments imposed respectively in *Wesson* and *Crenshaw*.

The Court of Appeals panel found no fault in the District Court's application of the Mississippi "factors" and affirmed, correctly noting that its function was not to second-guess the District Court or to apply the Mississippi "factors" *de novo*. *See Browning-Ferris*, 109 S. Ct., at 2922 (federal appellate review of punitive damage award governed by "abuse of discretion" standard).

The "non-rule" discernible from these circumstances is extremely elastic: if a punitive damage award is less than a defendant's net worth and within shouting distance of a prior punitive damage award sustained by the Supreme Court of Mississippi, the jury will be permitted "to play Robin Hood," App. F, 89a (Jones, J., dissenting), and the award will be sustained on appeal. Indeed, the law in Mississippi appears to be that virtually any punitive award will be sustained unless the judicial "conscience" of the Supreme Court of Mississippi is "shocked." *Bankers Life*, 483 So. 2d, at 279. Under this standard, an award of $1,500,000 in this case would have been virtually unreviewable by the court below and would have been well within the District Court's virtually unlimited discretion.

The petition should be granted so that this Court can finally resolve the question whether such a system, in which putative punitive damage defendants are given virtually no notice of the levels of punishment to which they may be subjected for ill-defined or undefined conduct, comports with the Due Process Clause. Review should be granted to resolve the question whether, in the absence of express legislative limits tailored to the type of conduct involved, juries and judges violate due process when they impose

punishment grossly disproportionate to the maximum statutory punishment allowable in that jurisdiction for similar misconduct.

Indeed, this Court should consider why due process is not violated by the imposition of any punitive damages in the absence of an established "range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). No "responsible officials" established a range of penalties for this case. Mississippi juries in *McGee*, *Bankers Life* and *Wesson*, having no more guidance than "to do what they think is best," *id.*, established the "range of penalties" utilized by the District Court in selecting $500,000 as an appropriate punishment in this case; such unfettered juries are surely not "responsible officials." As Justice Brennan has noted, "even where a statute sets a range of possible civil damages . . . the Due Process Clause forbids damages awards that are 'grossly excessive.'" *Id.*, *quoting Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). Under that standard, the award at issue is "grossly excessive."

That this case comes here after a bench trial makes it a particularly appropriate vehicle for the Court's review of these substantial questions. The facts of this case are not inflammatory. The District Court presumably performed its function as trier of fact conscientiously. Yet, the District Court imposed a punishment 500 times greater than the Mississippi legislature had at the time authorized for more egregious insurance practices for the simple reason that Reserve's administrative capabilities became, for a period, seriously inadequate to respond to the demands placed upon it. This case illustrates that even a conscientious trier of fact is bereft of meaningful moorings when it moves from the liability phase of punitive damage litigation and takes on the imposition of punishment.

C. The Question Whether The Imposition Of Punitive Damages For Violation Of A Retrospectively Applied Standard Of Conduct Violates The Contracts And Due Process Clauses Is Frequently Recurring, Is One On Which The Lower Courts Are Divided, And Warrants This Court's Review

In *Bankers Life*, Justice O'Connor noted that under Mississippi law, a tort defendant may suffer the imposition of punitive damages if it "acts with a certain mental state." 108 S. Ct., at 1655. In that case, the appellant had argued that in affirming the punitive damage award, the Supreme Court of Mississippi had created and applied a new standard of conduct, thereby giving the appellant "no advance notice of what conduct could render it liable for punitive damages." *Id.* Although the *Bankers Life* Court did not reach the issue, Justice O'Connor stated that "[a]ppellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case" and that, "because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause." *Id.*

That this due process issue arises frequently is not surprising. In *Aetna Life Insurance Co.* v. *Lavoie*, the Court observed in a similar context "that the law in the area of bad-faith-refusal-to-pay claims in Alabama, as in many other jurisdictions, was unsettled." 475 U.S., at 822. In this case, the District Court observed that the pertinent Mississippi cases "have often appeared inconsistent or contradictory." App. C, 49a, 682 F. Supp., at 1364. The substantive rules of conduct imposed by the common law courts are, by their nature, subject to constant change due to societal changes or, not infrequently, a change in the membership of a state's highest court. *See Curry* v. *Fireman's Fund Insurance Co.*, *supra*, slip op., at 2 (Vance, J., dissenting) ("Nothing has changed since 1986 to cause us now to overrule this long-standing principle of law except perhaps a change in the membership of this court.") Even where the statutory or common law exacts compensation to make a wronged plaintiff whole, such "retrospective" lawmaking

has been disfavored by this Court. *See generally Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Where, however, the States have attempted to impose penal sanctions retrospectively, this Court has been swift to apply the Due Process Clause to prohibit the judicial enlargement of obligations imposed by the criminal law. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).

As the Court implicitly recognized in *Browning-Ferris*, monetary punishment—whether imposed in a civil or criminal proceeding—is fundamentally different from a monetary exaction designed to compensate. *See United States* v. *Halper*, 109 S. Ct. 1892 (1989). In the case at bar, the substantive Mississippi "bad faith" law in existence at the time Reserve's conduct occurred—*Blue Cross and Blue Shield* v. *Campbell*, 466 So. 2d 833 (Miss. 1984)—appeared, as the District Court put it, "to place a duty on the hospital in insurance cases to submit complete and unambiguous records . . . ." App. C, 60a, 682 F. Supp., at 1369. In fact, as Reserve demonstrates above, the legal standard that an insurer in Mississippi must acquire *all* pertinent medical records before denying a claim came verbatim from the Supreme Court of Mississippi's 1985 opinion in *Bankers Life*, *see* pp. 6-9, *supra*, *after* Reserve's conduct occurred. This shift of the burden from the hospital or the insured to the insurer entails no mere clarification of prior law, and it constitutes the basis for the imposition of the punitive damage award in this case.

Had this case been tried before the decision of *Bankers Life* in August 1985, a federal district court sitting in diversity in Mississippi would have had to treat the issue of an insurer's duty to obtain *all* records as either decided in the insurer's favor by *Campbell* or, at best, an issue of first impression. In 1978, the federal district court in Mississippi, sitting in diversity, held that the imposition of punitive damages was "inappropriate" where the legal theory upon which the punitive damages were sought had not been recognized by the Mississippi courts. *Michael* v. *National Security Fire & Casualty Co.*, 458 F. Supp. 128, 131-32 (N.D. Miss. 1978). In doing so, that court aligned

itself with the majority of courts that have refused to impose punitive damages in the context of announcing a new substantive rule of conduct.[14] In contrast, the California courts have expressly rejected state and federal constitutional challenges to the retrospective imposition of punitive damages. *See, e.g., Peterson* v. *Superior Court*, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982). *See also Sliman* v. *Aluminum Company of America*, 112 Idaho 277, 731 P.2d 1267 (1986), *cert. denied*, 108 S. Ct. 2013 (1988); *Curry* v. *Fireman's Fund Insurance Co., supra.*

Because the case at bar involves an insurance contract, Reserve's challenge is cognizable under the Contracts Clause, Art. I, § 10, cl. 1, as well as the Due Process Clause of the Fourteenth Amendment. As the Court has observed, "The occurrence of major unforeseen contingencies . . . jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing . . . insurance funds . . . can have this effect." *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 721 (1978).

The Court of Appeals rejected the Contracts Clause argument under its prior precedent, which had held that the Contracts Clause "only applies to actions by the legislative authority of a state, not its judiciary." App. A, 27a n.6, 881 F.2d, at 1367 n.6, *citing Frazier* v. *Lowndes County*, 710 F.2d 1097, 1099 (5th Cir. 1983). But, as Reserve argued below and shall argue on the merits in this Court, the language and history of the Contracts Clause will not sustain an interpretation that would prohibit the Mississippi legislature from achieving by statute the result in this case but permit its courts to achieve that result by judicial decree. As stated by Judge Jones in dissent, "[t]he constitutional requirement that clarity and ascertainable standards must guide legal punishment may not be waived

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[14] *E.g., Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 361 (1978); *Phipps* v. *Clark Oil & Refining Corp.*, 408 N.W.2d 569, 573 (Minn. 1987); *Hansen* v. *Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Nees* v. *Hocks*, 272 Or. 210, 536 P.2d 512, 517 (1975).

simply because the challenged law originated in courts rather than a legislature." App. F, 88a. The statement by this Court, after full briefing of this issue in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S., at 828, that the "retrospective imposition of punitive damages under a new [judicially created] cause of action violates . . . the Contracts Clause . . . raise[s an] important issue[]" remains correct today. In any event, there is no serious doubt that the Due Process Clause does not permit juries or courts to define punishable conduct and then impose punishment for that conduct in the same case. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). Reserve's challenge presents a substantial question under either Clause, the question is a frequently recurring one, and the division among the lower courts on whether punishment may be inflicted retrospectively in such circumstances should be resolved by this Court.

CONCLUSION

The punitive damage phenomenon threatens to overrun the civil justice system and is "a key feature of the abuse of the litigation process." App. F, 90a (Jones, J., dissenting). Neither state legislatures nor state and lower federal courts seem inclined to restrain the avalanche. Only this Court, by agreeing to decide the questions it has repeatedly characterized as important, can bring some order to these increasingly chaotic punitive systems.

February 13, 1990

Respectfully submitted

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

Sept. 5, 1989.

No. 88-4421.

Patricia Stephenson EICHENSEER,
Plaintiff-Appellee,

v.

RESERVE LIFE INSURANCE COMPANY,
Defendant-Appellant.

Before RUBIN, POLITZ and JOHNSON, Circuit Judges:

JOHNSON, Circuit Judge:

In the instant diversity action, appellant Reserve Life Insurance Company appeals a final judgment in favor of appellee Patricia Eichenseer on the claim of Eichenseer alleging bad faith and gross negligence on the part of Reserve Life in denying Eichenseer health insurance benefits under a major medical insurance policy issued by Reserve Life Following a bench trial, the district court awarded Eichenseer $1,000 in extra contractual damages and $500,000 in punitive damages. 682 F.Supp. 1355. Persuaded that the judgment of the district court is consistent with the guarantees enumerated in the United States Constitution, as well as Mississippi law in this area, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On January 5, 1983, appellant Reserve Life Insurance Company issued a major medical insurance policy to appellee Patricia Eichenseer. In applying for the above policy, Eichenseer informed Reserve Life insurance agent Sue

Wilson that her regular physician was Dr. L.R. Murphree, but that she had not visited Dr. Murphree in recent months. Further, as part of her application for medical insurance with Reserve Life, Eichenseer executed a medical release which authorized Reserve Life to contact Dr. Murphree or any other doctor of Eichenseer to verify the condition of her health. Sue Wilson subsequently contacted Dr. Murphree on behalf of Reserve Life to verify the health condition of Eichenseer, whereupon Dr. Murphree informed Wilson that "everything was fine." After receiving the above information from Dr. Murphree, Wilson collected the appropriate premium payment from Eichenseer and thereafter, informed Eichenseer that she was insured.

Eighteen days after the effective date of the Reserve Life medical insurance policy, Eichenseer was admitted to the hospital by Dr. Murphree for severe abdominal pain. On the hospital admission sheet, Dr. Murphree noted the following:

> *Ch[i]ef Complaint:* Pain [i]n the lower abdomen.
>
> present illness: The pain has been present in the lower abdomen in period *for the last 2-3 years*. This attack started about three days ago and has become progressively worse. She has occasional headaches. The head is hurting now, some sore throat. Occasional cough which she contributes to smoking. Appetite is terrific. Bowels have not been moving well in the last few days. Nicturia 2-3 times a night.

(emphasis added). Eichenseer remained in the hospital for a total of sixteen days due to her condition. During the course of her stay, a sonogram was performed revealing the possible presence of an adnexal cyst, edometriosis, or pelvic inflammatory disease. Ultimately, Dr. Murphree performed a total hysterectomy on Eichenseer after which Eichenseer was discharged from the hospital on February 1, 1983. On his discharge summary for Eichenseer, Dr. Murphree diagnosed the condition of Eichenseer as acute

pelvic inflammatory disease, but noted the presence of peritonitis, chocolate cysts, tubo-ovarian abscesses, chronic cervicitis, and massive adhesions, indicating the presence of endometriosis.

Thereafter, Eichenseer received $6,658.35 in medical bills which she submitted to Reserve Life in late February for payment. Upon receipt on February 28, 1983, of the above bills, Reserve Life established a work sheet for Eichenseer's claim and forwarded the file to the appropriate department for examination. After Eichenseer signed a "proof of claim" form on March 23, 1983, Reserve Life forwarded to Eichenseer on April 21, 1983, payment for those of her hospital bills covered under a Reserve Life policy previously purchased by Eichenseer's parents on which Eichenseer was listed as an insured. Reserve Life, however, formally denied on June 2, 1983, the claim of Eichenseer submitted under the major medical insurance policy purchased by Eichenseer from Sue Wilson in January 1983. Reserve Life denied the above claim on the basis that Eichenseer had suffered in the hospital from a pre-existing illness which was not covered by the terms of the policy. The following is an account of the relevant facts, as found and set forth in the extensive opinion of the district court, which occurred after Reserve Life denied the claim by Eichenseer for health insurance benefits under her major medical policy.

> Plaintiff (Eichenseer) called Reserve Life on June 21, 1983, and requested an explanation for the denial. Al Vick, a Reserve Life employee, told Eichenseer that her file was still with the claims department, but that he would call her back once he had been able to find her file.
>
> Unbeknownst to the public, Reserve Life was by mid-1983, experiencing severe organizational problems. Due to the unexpected success of a recently offered insurance policy, numerous claims were being

received by Reserve Life in addition to the normal number of claims. The employees, faced with the task of matching claim correspondence with policyholders' files, often lost documents or were unable to find and file them for weeks at a time. Although the company has since computerized its operations, claims submitted in 1983 were often processed manually and mishandled.

Dena Marie Brannon was the Reserve Life employee responsible for handling Eichenseer's claim. Prior to denying her claim, Brannon had obtained only Dr. Murphree's admission summary and had relied solely on the following statement to support a denial: 'The pain has been present in the lower abdomen in periods for the last 2-3 years. This attack started about three days ago. . . . ' Although the documents then held also listed as an admitting diagnosis "Acute PID," Brannon interpreted the reports to indicate that Eichenseer had been suffering from her illness since 1980-81. Importantly, Brannon did not consult with either Eichenseer or Dr. Murphree before making this decision and chose not to consult with an in-house physician retained by Reserve Life on a part-time basis.

Although Eichenseer made repeated telephone calls to Reserve Life during the following weeks, she received no relief. On August 22, 1983, after receiving one such call, Reserve Life employees wrote a letter to Dr. Murphree requesting Eichenseer's medical records from his clinic. These records were sent to the insurer in a timely fashion, but were apparently misplaced due to the ongoing organizational crisis.

Eichenseer called Reserve Life again on September 20, 1983, to inquire about the status of her claim. The employee who talked to Eichenseer was unable to find either the file or her clinical records, but when

asked if the records had been received, responded by stating that the file was still with the claims department. An exhaustive "stop search" was conducted for the records, but once again ended in failure.

Eichenseer again called Reserve Life on October 24, 1983, and asked Al Vick about her claim. Vick, unable to find the clinical records, told Eichenseer that they had been lost. Eichenseer volunteered to send additional copies to him immediately, and Vick said that would be okay. A package containing these records was sent by registered mail to the insurer by the end of the day.

Al Vick apparently failed to inform Dena Brannon of his conversation with Eichenseer. On October 25, 1983, Brannon wrote Eichenseer a second letter denying her claim on the ground of pre-existing illness. This denial was made despite the absence of the clinical records, and neither Eichenseer nor medical authorities had been consulted in the interim. Eichenseer's plea for officials to check with her out-of-state physician was likewise rejected.

Dr. Murphree's clinical records were received by Reserve Life on October 26, 1983. According to Jerry Jenkins, Dena Brannon's supervisor, no one saw the records except Brannon. Receipt of the records was not acknowledged, and Brannon failed to communicate with Eichenseer for the next five weeks. When asked to explain this performance, Jenkins explained that it was due to mismanagement.

By late 1983, hospital officials had been unsuccessful in their attempts to collect for Eichenseer's hospital stay. Eichenseer's bill was turned over to a local collection agency. She began to receive telephone calls from the agency's employees at work and at home late at night. Already financially troubled, the calls at work forced Eichenseer to lower her production

level and incur the wrath of her supervisors for receiving personal calls on company time. Eichenseer informed Reserve Life of her troubles during her periodic telephone calls; interestingly, no mention of this can be found in the telephone memos contained in her claims file.

On December 13, 1983, Dena Brannon wrote Eichenseer acknowledging receipt of Dr. Murphree's clinical records. Brannon stated that Reserve Life could not consider payment of Eichenseer's claim unless and until Dr. Murhpree altered the hospital record to clear up the confusion over the "2-3 years" remark. Brannon further requested that Eichenseer send certified copies of the amended record to Reserve Life in order to allow a medical consultant to review her case.

Eichenseer's response to this letter was twofold. First, she asked Dr. Murphree to comply with Reserve Life's new request. Second, she informed her father of her continuing troubles, and he decided to hire an attorney to represent her.

Dr. Murphree initially declined to alter the hospital records as requested. Convinced that such a change was not ethically permissible, he instead agreed to sign an affidavit recanting the "2-3 years" remark. An affidavit to this effect was not executed, however, until July of 1984, many months later.

Eichenseer's counsel wrote a demand letter to Reserve Life on April 25, 1984, seeking either payment of the claim or an extended explanation for its denial. Counsel also offered to send any additional documents which Reserve Life desired to obtain. Reserve Life wrote to counsel on June 21, 1984, and reaffirmed its denial, attaching in support the admissions summary and clinical records previously received. In a follow-up letter dated July 10, 1984, the company re-

peated its request for certified copies of the hospital record to enable a medical consultant to review the record.

On July 23, 1984, Eichenseer's counsel mailed to Reserve Life a notarized affidavit of Dr. Murphree which asserted that the hospital record was in error and that the statement lower abdomen pain was present for "2-3 years" should read "for 2-3 days." Reserve Life received the letter and affidavit, but lost both documents over the next few weeks.

Eichenseer personally delivered a copy of Dr. Murphree's affidavit to an employee of the Monroe County Hospital and asked that it be placed in the official hospital files. The employee did not refuse Eichenseer's request, but it was never placed in the records of the hospital.

In October of 1984, Eichenseer was again forced to enter the local hospital for treatment of an unrelated illness. Due to her prior financial troubles and the defendant's refusal to pay Eichenseer's prior claims, she was forced to sign papers seeking charitable asistance to pay her bills. Eichenseer's anxiety over the mishandling of her claim increased accordingly.

On October 16, 1984, Eichenseer's counsel sent another demand letter to Reserve Life. Six weeks later, a telegram dated November 29, 1984, was received from Dena Brannon in response stating that she was 'having difficulty in assembling the file' and that Eichenseer's 'patience in this matter is greatly appreciated.'

Reserve Life mailed Eichenseer a follow-up letter January 4, 1985. The insurer reaffirmed its denial of her claim and based its decision on the failure of Dr. Murphree to correct the hospital records.

(footnote omitted).

Thereafter, Eichenseer filed the instant action against Reserve Life seeking contractual damages under the Reserve Life major medical insurance policy, extra contractual compensatory damages for mental anguish, and punitive damages for gross negligence or reckless disregard on the part of Reserve Life in failing to pay her insurance claim. During the course of pretrial discovery, Reserve Life learned of the affidavit previously executed by Dr. Murphree to the effect that the symptoms of Eichenseer upon admission to the hospital had been present for "2-3 days" instead of "2-3 years." After reviewing the above affidavit, Reserve Life paid the claim of Eichenseer on June 16, 1986.

Despite the payment by Reserve of her claim for benefits under the medical insurance policy, Eichenseer determined to pursue the instant action for extra contractual damages and punitive damages. After a bench trial, the district court awarded Eichenseer $1,000 in compensatory damages and $500,000 in punitive damages. In doing so, the district court concluded that Reserve Life was in fact grossly negligent in failing to pay the claim of Eichenseer. Reserve Life now appeals.

II. DISCUSSION

On appeal, Reserve Life urges that the district court was in error in making the factual and legal determinations under state law that Reserve Life was grossly negligent in failing to pay the insurance claim of Eichenseer. Reserve Life also attacks the imposition of the $500,000 in punitive damages as violative of the United States Constitution and the Constitution of the State of Mississippi. We will address initially the former contention of Reserve Life regarding the factual and legal determinations of the district court, and then discuss the constitutional issues.

A. *The Findings and Conclusions of the District Court*

On appeal, Reserve Life challenges the legal conclusions reached by the district court that it lacked an arguable basis in denying the claim of Eichenseer and that it acted with gross negligence in processing the claim. Specifically, Reserve Life maintains that the district court incorrectly applied Mississippi substantive law in concluding that punitive damages were warranted against Reserve Life on the facts of the instant appeal. To resolve the above contention of Reserve Life, it is necessary to review Mississippi law on the liability of an insurance company for punitive damages resulting from the bad faith refusal to pay a legitimate insurance claim.

In *Progressive Casualty Ins. Co. v. Keys*, 317 So.2d 396 (Miss.1975), the Mississippi Supreme Court for the first time recognized that an insurance company could be subjected to punitive damages, but stated that "[p]unitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." *Progressive Casualty*, 317 So.2d at 398. Following *Progressive Casualty*, in perhaps the seminal case in Mississippi on the law of "bad faith refusal" by an insurance company, *Standard Life Ins. Co. v. Veal*, 354 So.2d 239 (Miss.1977), the Mississippi Supreme Court affirmed a $25,000 award of punitive damages against an insurance company for failing to pay a legitimate claim. In *Veal*, the court refined the relevant query in a bad faith refusal claim by concluding that, "if an insurance company has a *legitimate reason or an arguable reason* for failing to pay a claim, punitive damages will not lie, ... " *Veal*, 354 So.2d at 248 (emphasis added). In so concluding, the Mississippi Supreme Court recognized that Mississippi law generally does not favor punitive damages and that such damages should be allowed only "with caution and within narrow limits." *Id.* at 247. *See also Life & Casualty Ins.*

Co. v. Bristow, 529 So.2d 620, 622 (Miss. 1988), *cert denied*, ___ U.S. ___, 109 S.Ct. 794, 102 L.Ed.2d (1989). Nevertheless, the *Veal* court also observed that:

> This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim and bases its refusal to honor the claim on a reason clearly contrary to the express provisions of its own policy. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with vertiable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Veal, 354 So.2d at 248.

Since *Veal*, what exactly constitutes a "legitimate or arguable reason" justifying the denial of payment by an insurance company on an insurance claim has been clarified by various decisions of the Mississippi Supreme Court. Specifically, the Mississippi Supreme Court stated in *State Farm Fire & Casualty Company v. Simpson*, 477 So.2d 242 (Miss.1985) that:

> We are of the opinion the term 'legitimate or arguable reason,' although spawning much comment in our cases and in briefs and arguments of counsel, is nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to the heightened level of an independent tort. Additionally, the very term expresses the holding of this Court establishing a distinction between ordinary torts, the product of forgetfulness, oversight, or the like; and heightened torts, which are the product of gross, cal-

> lous or wanton conduct, or, if intentional, are accompanied by fraud or deceit.

Simpson, 477 So.2d at 250. Stated in another fashion by Justice Robertson in his concurrence in *Blue Cross & Blue Shield, Inc. v. Campbell*, 466 So.2d 833 (Miss.1984),

> [a]n arguable reason is one in support of which there is some credible evidence. There may well be evidence to the contrary. A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he acts.

Campbell, 466 So.2d at 851. Further, "[i]n determining whether the insurance company had an arguable basis for refusing to pay the claim, 'the evidence in each particular case will decide whether a punitive damage instruction must be granted or refused,' " or, as in the instant case, whether the district court may properly impose punitive damages against the insurance company. *Tutor v. Ranger Insurance Co.*, 804 F.2d 1395, 1398 (5th Cir.1986) (quoting *Mississippi Farm Bureau Mutual Insurance Co. v. Todd*, 492 So.2d 919, 933 (Miss. 1986)).

A determination by the district court that an insurance company lacked a legitimate or arguable reason for denying payment of an insurance claim does not, however, automatically equate under Mississippi jurisprudence with a conclusion that punitive damages in a given case are appropriate. For instance, clerical errors and other honest mistakes fail to justify punitive damages, even though an arguable basis to deny a claim is absent. *Blue Cross & Blue Shield, Inc. v. Maas*, 516 So.2d 495, 597 (Miss.1987). Rather, the district court must next determine whether the insurer has "committed a willful or malicious wrong, or acted with gross or reckless disregard for the insured's rights" so as to rise to the level of an independent tort. *Pioneer Life Insurance Co. v. Moss*, 513 So.2d 927, 930

(Miss.1987); *Bristow*, 529 So.2d at 622. In a jury setting, the trial court need only determine whether there is a jury issue as to the above inquiry before submitting the issue of punitive damages to the jury; whereas, in the setting of a bench trial as in the instant case, the above threshold inquiry and the ultimate conclusion regarding the gross or reckless conduct of the insurance company collapse into a single query for the district court which must be answered in the affirmative before imposing punitive damages.

In sum, whether or not punitive damages are appropriate in a claim of bad faith on the part of an insurance company in denying a legitimate claim is a two-step inquiry. Specifically, the district court must conclude that (1) the insurance company had no legitimate or arguable reason to deny payment of the claim, and (2) the insurer committed a willful or malicious wrong, or acted with gross or reckless disregard for the insured's rights. Both of the above determinations of the district court constitute questions of law which this Court reviews de novo on appeal. *Bristow*, 529 So.2d at 623; *Reserve Life Ins. Co. v. McGee*, 444 So.2d 803, 809 (Miss.1983). Cognizant of the fact that, under Mississippi law, "any plaintiff asking for punitive damages, or any special or extraordinary damages based on bad faith of an insurance company has a heavy burden," we are persuaded for the following reasons that the district court correctly applied Mississippi law to conclude that punitive damages against Reserve Life were indeed appropriate in the instant case. *Campbell*, 466 So.2d at 842.

In an extremely thorough and well-written opinion, the district court, after setting forth the relevant Mississippi law on "bad faith refusal", concluded that Reserve Life lacked a legitimate or arguable reason at all relevant times to deny the claim of Eichenseer for health benefits. In particular, the district court found that no competent medical authority existed on which Reserve Life could rely in denying the claim of Eichenseer due to a preexisting con-

dition. In this regard, we note that one possible justification for the reluctance on the part of Reserve Life to pay the claim of Eichenseer was the notation by Dr. Murphree on the hospital admission chart that the abdominal pain for which Eichenseer was being admitted had been present for the last "2-3 years." The evidence shows, however, that this statement by Dr. Murphree was clearly in error as inconsistent with the diagnosis of acute pelvic inflammatory disease also made by Dr. Murphree at the time of admission. As noted by the district court, acute pelvic inflammatory disease is an infectious condition which causes the reproductive organs of a woman to become swollen and painful. The onset of the disease is, by definition, sudden. Thus, at a minimum, this one brief medical record, the hospital admission chart, reflected an inconsistency in the diagnosis of Eichenseer's condition which should have alerted Reserve Life to obtain further medical records and refer the claim to a physician for competent medical advice and evaluation prior to denying Eichenseer's claim for benefits. Instead, Reserve Life failed to take such action or to properly investigate the claim.

In fact, even when Dr. Murphree ultimately executed an affidavit to the effect that the phrase "2-3 years" on the hospital admission chart should have been "2-3 days," Reserve Life lost that correction and continued to deny the claim.[1] When Reserve Life denied the claim for the fifth time, approximately two years from the date Eichenseer initially presented her claim for benefits to Re-

[1] At trial, Reserve Life denied ever having received such an affidavit by Dr. Murphree from Eichenseer. Noting the disorganization and mismanagement of the claims department at Reserve Life during the relevant period, however, the district court concluded that the affidavit was in fact mailed by counsel for Eichenseer and received by Reserve Life who subsequently lost the critical document. Since the conclusion of the district court regarding the receipt of the affidavit by Reserve Life is a reasonable inference from the evidence presented at trial, we cannot say that the above conclusion is clearly erroneous. Fed.R.Civ.P. 52(a).

serve Life, the record reveals that the affidavit by Dr. Murphree correcting his earlier statement on the hospital admission chart still was not contained in the claims file for Eichenseer at Reserve Life. Further, the file lacked some of the hospital records pertaining to the stay of Eichenseer at the hospital, and the file also revealed that no physician had yet been consulted by the company with respect to the claim. In fact, no phyusician had been consulted at any time prior to denying the claim of Eichenseer on June 2, 1983, October 25, 1983, December 13, 1983, June 21, 1984, or January 4, 1985.

At this juncture, it should be noted that the district court did recognize that Reserve Life ultimately possessed at least an arguable reason in early 1987 to deny the claim of Eichenseer after receiving a report from the hospital pathologist and consulting a medical expert for the proper interpretation of that report. This arguable basis was that Eichenseer suffered from endometriosis, a chronic condition which evidently exhibits similar symptoms to those of acute pelvic inflammatory disease. Nevertheless, the above arguable basis on which Reserve Life seeks to rely in justifying its denial of Eichenseer's claim and thereby avoid punitive damages did not exist at the time Reserve Life initially denied the claim of Eichenseer or at any time thereafter until the instant suit was commenced. Indeed, Reserve Life's own medical expert, Dr. John R. Sanders, agreed with the experts of Eichenseer at trial that a final medical diagnosis should not be made in a situation such as that of Eichenseer until after the pathology lab has reported its results.

Implicit within the above acknowledgment by the district court that Reserve Life possessed an arguable reason to deny Eichenseer's claim at the time of trial, while at the same time concluding that Reserve Life did not possess an arguable reason to deny Eichenseer's claim sufficient to preclude the imposition of punitive damages, is the determination by the district court that the relevant window

for the latter inquiry regarding punitive damages is necessarily a flexible one dependent upon the facts of a particular case. For instance, in seeking to avoid the imposition of punitive damages in a bad faith refusal case, an insurance company may not delay investigation of a claim for a significant period of time and then, after investigation, rely on the arguable basis for denying the claim ultimately discovered through the dilatory investigation. Thus, we are persuaded that the above approach by the district court is the proper one, particularly on the facts of the instant case where the arguable reason to deny the claim did not arise until after suit was commenced.

We also conclude that the district court did not err in reaching the legal conclusion that Reserve Life acted with gross negligence and a reckless disregard for the rights of its insured in denying Eichenseer's claim over a prolonged period of time without properly investigating that claim. The above conclusion of the district court is supported by the well-established and detailed obligations which Mississippi law places upon insurance companies against which medical claims have been filed. These obligations are accurately set forth in some detail in the extensive opinion of the district court. It is not necessary to repeat each of those obligations here; instead, we stress just one of those requirements since it was so obviously the subject of major failure on the part of Reserve Life in processing the claim of Eichenseer.

Pursuant to Mississippi law, if an insurance claim is related to the health of a claimant, an insurance company must make "reasonable efforts" to obtain all available medical information relevant to the claim. *See Life Insurance Co. v. Allen*, 518 So.2d 1189 (Miss.1987); *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 271-73 (Miss.1985). *See generally, Reserve Life*, 444 So.2d 803. After recognizing the above obligation of an insurance company in Mississippi, the district court in the instant

appeal analyzed several Mississippi "bad faith refusal" cases to determine that which constitutes "reasonable efforts" on the part of an insurance company to obtain such medical information. After doing so, the district court then concluded that the complete failure of Reserve Life to comply with the above duty of obtaining the relevant medical information as to Eichenseer's claim, as well as the delay by Reserve Life in processing Eichenseer's claim, constituted a reckless disregard for the rights of Eichenseer. We agree with the above conclusion of the district court and in doing so, observe that it is a powerful testament to the complete default of Reserve Life to comply with this clear requirement of Mississippi law in the instant case that Reserve Life neglected to make any effort at all to obtain the relevant medical information as to Eichenseer's claim, and indeed failed to ask any physician's advise with respect to the claim of Eichenseer, until almost four years after the claim was filed. Accordingly, we conclude that the district court did not err in determining that (1) Reserve Life lacked a legitimate or arguable reason to deny Eichenseer's claim, and (2) that Reserve Life acted with gross and reckless disregard for the rights of Eichenseer in processing her claim.[2]

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[2] In challenging the above legal conclusions of the district court, Reserve Life maintains that the district court improperly interpreted and applied the relevant Mississippi cases in this area of the law. We reject the above contention of Reserve Life, but would discuss briefly one decision in particular which Reserve Life contends was erroneously relied upon by the district court. In *Blue Cross & Blue Shield v. Campbell*, the Mississippi Supreme Court reversed an award of extra contractual damages to the plaintiff after finding that the insurer possessed a reasonably arguable basis for denying the claim of the insured due to the lack of "proof of [the hospital] doing any act, taking any step to satisfy Blue Cross's contention that [the plaintiff] had been hospitalized for a preexisting condition, ... " *Campbell*, 466 So.2d at 840. Reserve Life asserts that the factual circumstances in *Campbell* parallel those of the instant case and thus, punitive damages are not appropriate. Several critical distinctions exist, however, which defeat the

Reserve Life next argues on appeal that the district court erroneously found the existence of certain facts relevant to the instant dispute between the parties. Pursuant to Federal Rule of Civil Procedure 52(a), this Court reviews findings of fact of the district court under a clearly erroneous standard. We need not discuss in detail, however, the factual findings of the district court alleged to be clearly erroneous by Reserve Life as a review of the record reveals that the critical factual findings of the district court are amply supported by the evidence presented at trial. Those findings reflect a factual scenario wherein Reserve Life several times denied the medical benefits claim of Eichenseer without ever having sought medical advice from its own staff or from an outside physician, and without ever having obtained and reviewed the clinical records of Eichenseer.[3]

B. *The Constitutional Claims*

In the present era of large damage awards, perhaps no other issue has generated as much interest and contro-

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above contention of Reserve Life. Those distinctions are (1) the information in the medical records relied upon by Reserve Life to deny Eichenseer's claim was far more ambiguous than that contained in the medical records in *Campbell*; (2) Reserve Life failed to obtain a medical opinion until after Eichenseer filed suit, while Blue Cross promptly referred the claim to doctors and nurses on their medical staff after receiving the claim; and (3) contrary to the instant case, there was no issue of negligence on the part of Blue Cross in processing the claim in that case.

[3] Reserve Life also maintains on appeal that, even if Reserve Life had properly investigated the claim of Eichenseer, that claim still would have been denied as the final report of the hospital pathologist would have provided an arguable basis on which to deny the claim. Thus, Reserve Life argues the alleged grossly negligent acts in the instant case did not proximately cause the harm suffered by Eichenseer. The above contention by Reserve Life is without merit, however, as the argument overlooks the fact that it was the delay by Reserve Life in properly investigating Eichenseer's claim which caused the injury to Eichenseer, not the denial of the claim itself.

versy as the proposition that the imposition of punitive damages violates certain guarantees secured by the United States Constitution such as the Eighth Amendment prohibition against excessive fines and the Fourteenth Amendment prohibition against deprivation of property without due process of law. On appeal, Reserve Life challenges the imposition of punitive damages in the amount of $500,000 in the instant case as violative of the Eighth and Fourteenth Amendments. We reject the eight amendment challenge of Reserve Life on the basis of recent Supreme Court precedent. We likewise find without merit the fourteenth amendment due process challenge of Reserve Life to the imposition of punitive damages in this case. In doing so, however, we specifically decline to resolve the difficult issue of whether the Due Process Clause acts as a check on the discretion of a trier of fact to impose punitive damages in the absence of any statutory limits; instead, we conclude that, assuming the Due Process Clause so limits the imposition of punitive damages, on the facts of the instant case, due process was not violated by the $500,000 punitive damage award against Reserve Life.

Addressing first the eighteenth amendment claim of Reserve Life, we look to the decision issued only last term by the Supreme Court in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), wherein the Supreme Court foreclosed the eighth amendment challenge to the imposition of punitive damages raised here by Reserve Life. Specifically, the Supreme Court concluded that, "on the basis of the history and purpose of the Eighth Amendment, . . . its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Browning-Ferris*, 109 S.Ct. at 2911. While the decision of the Supreme Court in *Browning-Ferris* involved an award of punitive damages imposed upon the defendant by a jury, and not by a trial judge following a bench trial as in the instant case, we can perceive of no distinction between the two

scenarios which would dictate a different conclusion in the latter instance. Accordingly, we reject the eighth amendment challenge raised by Reserve Life to the $500,00 award of punitive damages on the basis of the holding by the Supreme Court in *Browning-Ferris* that the excessive fines prohibition of the Eighth Amendment does not apply to awards of punitive damages in cases between private parties.

Reserve Life also maintains that the imposition of $500,000 in punitive damages for its conduct in processing the claim of Eichenseer violates the constitutional protections afforded by the Due Process Clause of the Fourteenth Amendment. Initially, we note that the Supreme Court, after rejecting the eighth amendment challenge by the defendant to the award of punitive damages in *Browning-Ferris*, declined to address the above issue due to the failure of the petitioners in that case to raise the due process argument before either the district court or the court of appeals, or to make specific mention of the due process argument in their petition for certiorari before the Supreme Court. *Browning-Ferris*, 109 S.Ct. at 2921. The Supreme Court, however, has not been without comment on the issue of whether the Due Process Clause operates to limit the size of punitive damage awards by juries in civil cases brought by private parties. In fact, the issue itself is not a novel one in Supreme Court jurisprudence. In several decisions, the Supreme Court has indicated that the Due Process Clause places outer limits on the size of a civil damage award to a private litigant where that award is imposed pursuant to a statutory scheme. These decisions would seem to hold that, under such circumstances, the Due Process Clause forbids damage awards that are "grossly excessive," or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909); *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct.

71, 73, 64 L.Ed. 139 (1919). *See Browning-Ferris*, 109 S.Ct. at 2923 (Brennan, J., concurring). *See also Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491, 35 S.Ct. 886, 888, 59 L.Ed. 1419 (1915); *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 522-23, 6 S.Ct. 110, 113-14, 29 L.Ed. 463 (1885).

As noted by the Supreme Court in *Browning-Ferris*, however, the issue of whether "due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" has never been directly addressed by the high court. *Browning-Ferris*, 109 S.Ct. at 2921. Nonetheless, several justices have expressed their views on the issue. For instance, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988), a Mississippi bad faith refusal case, Justice O'Connor, in a separate opinion, intimated that the method by which Mississippi allows a jury to impose punitive damages on a defendant may violate the Due Process Clause. Highlighting the fact that "[p]unitive damages are not measured against actual injury, so there is no objective standard that limits their amount," Justice O'Connor stated that:

> Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, 'for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong.' Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.

Crenshaw, 486 U.S. at ___ , 108 S.Ct. at 1655-56 (citations omitted).

Subsequent to the issuance of the opinion in *Crenshaw*, two other justices have discussed the potential application of the Due Process Clause to punitive damage awards. In *Browning-Ferris*, Justice Brennan, in a separate concurrence joined by Justice Marshall, commented on the due process issue, stating that, "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris*, 109 S.Ct. at 2923. Justice Brennan further stated that,

> [b]ecause '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id.

Despite recognizing the importance of the due process issue in the above decisions, the Supreme Court recently denied three petitions for certiorari in cases which sought to raise the issue; thus, a definitive resolution of this highly controversial issue is not foreseeable in the near future. *See Metromedia Inc. v. April Enterprises, Inc., cert. denied*, ___ U.S. ___ , 109 S.Ct. 3242, 106 L.Ed.2d 589 (1989); *Goodyear Tire & Rubber Co. v. Hodder*, 426 N.W.2d 826 (Minn.1988), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989); *Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir.1988), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989). Further, it is noted that no circuit court has yet ruled on this issue. Nonetheless, we need not become the first court to resolve this

challenging inquiry as, assuming arguendo that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties, the protections afforded by the Due Process Clause were not violated on the facts of the instant case. Prior to setting forth the reasons why the Due Process Clause is not violated on the facts of this specific case, however, we make the following observations regarding the Due Process Clause and punitive damages.

Pursuant to the Due Process Clause of the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property, without due process of law." Interpreting the above amendment, the Supreme Court has stated that the Due Process Clause was intended "to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244, 4 L.Ed. 559 (1819)). Further, the Supreme Court has concluded that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21, 15 L.Ed.2d 447 (1966).

The due process arguments recently being raised by defendants to the imposition of punitive damages, and the argument raised by Reserve Life in the instant appeal, revolve primarily around the premise that punitive damages should not be imposed by juries which have been provided with precious little guidance as to the appropriate amount to be imposed on a defendant in a particular instance. By allowing juries broad discretion in imposing punitive damages without such guidance, it is argued that jury awards are inconsistent and arbitrary, with one defendant being assessed $2,000,000 in punitive damages

for the same conduct which another defendant may only be assessed $10,000 in punitive damages. In this regard, Reserve Life argues in the instant appeal that the imposition of punitive damages under Mississippi law is done without adequate standards and thus, there is a vagueness in the process that violates the requirements of the Due Process Clause.

In the instant case, however, the due process rights of Reserve Life were not violated as the punitive damages law of Mississippi in the specific context of bad faith refusal cases provided Reserve Life with adequate notice of the type of conduct which would subject it to a significant punitive damage award. Based on the law of these cases, Reserve Life should have known that its conduct in processing the claim of Eichenseer in such a reckless and grossly negligent manner would lead to the imposition of a significant punitive damage award. In particular, we note once again the well-established requirement in Mississippi law that an insured make reasonable efforts in obtaining all relevant medical information regarding the claim of an insured for health benefits. In the instant case, despite being provided with access to the medical records of Eichenseer, Reserve Life failed to obtain the relevant medical information or to refer the claim of Eichenseer to its medical staff or a competent physician for evaluation until four years following the initial claim of Eichenseer for benefits.[4]

Further, and importantly, the instant case is not the first instance wherein Reserve Life has been assessed punitive damages for the grossly negligent manner in which it processed the claim of an insured. *See Reserve Life*, 444 So.2d 803. In *McGee*, Reserve Life was assessed a total

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[4] Of course, mere delay in investigating a claim will not support an award of punitive damages unless, as in the instant case, that delay is so unreasonable as to constitute an independent tort. *Tutor*, 804 F.2d at 1398-99.

of $158,000 in damages for its conduct in failing to adequately investigate the medical history of its insured prior to issuing the policy, and then denying coverage once the insured submitted a claim under the policy. The fact that substantial punitive damages had been imposed previously against Reserve Life for its mishandling of the claim of an insured provided positive notice to Reserve Life that it would likely be assessed even larger damages in the future for the careless and reckless handling of the claim of an insured.

Finally, in concluding that, even if the Due Process Clause limits the imposition of punitive damages, the guarantees of due process would not be violated in the instant case, we rely on the fact that the district court properly applied the criteria for imposing punitive damages under Mississippi law in reaching its decision and thus, did not act in an arbitrary or capricious fashion. Under the common law and under the law of punitive damages as it has developed in Mississippi, "[p]unitive damages 'are not compensatory for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' " *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125, 60 L.Ed.2d 698 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974)). In the instant appeal, the conduct which the district court sought to deter through the imposition of punitive damages against Reserve Life in the amount of $500,000 was (1) the wrongful denial of the claim of an insured due to improper investigation of the claim, including the failure to use reasonable efforts to obtain relevant medical information and to refer the claim to a physician for competent medical evaluation of the claim; and (2) the delay in processing the claim of an insured due to mismanagement and disorganization in the insurance company.

Pursuant to Mississippi law, once it is established that punitive damages in some amount should be allowed, the amount thereof is determined by reference to the following factors:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future;
>
> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses:
>
> (3) The pecuniary ability or financial worth of the defendant.

Crenshaw, 483 So.2d at 278 (citations omitted). Other factors to be considered in determining the final amount of punitive damages to be imposed are the degree of the offense, the presence or absence of malice, the motive behind the actions, the injury intended, and the public sense of justice and propriety. *See generally, Mutual Life Insurance v. Estate of Wesson*, 517 So.2d 521, 532 (Miss.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2035, 100 L.Ed.2d (1988). Finally, "the punitive damage award amounts to a measure of compensation to the plaintiff for service to the public in bringing the action, which should act as a deterrent of similar acts of wrongdoing to other members of the public." *Wesson*, 517 So.2d at 532.[5]

Applying the above factors in the instant case, the district court drew special attention to the fact that the punitive damages previously imposed upon Reserve Life in *McGee* apparently "did not get the attention of Reserve Life and had little, if any, deterrent effect." As a result,

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[5] We observe that the above criteria, on the facts of the instant case, satisfy any proportionality concerns as to the $500,000 damage award for due process purposes. In this regard, we are presuaded that it would be far more appropriate for the Mississippi legislature—not this court—to set forth any more exact proportionality guidelines for punitive damages in Mississippi.

to effectively deter Reserve Life from engaging in grossly negligent conduct in the future, the district court impossed a greater amount of punitive damages in the instant case than was imposed in *McGee*. Further, while not finding malice on the part of Reserve Life in wrongfully denying Eichenseer's claim, the district court did conclude that the motive behind the actions of Reserve Life in the processing of Eichenseer's claim was primarily to save money. In this regard, the district court observed that "[i]f an insurer uses its superior position to wrongfully deny a claim under a policy, the public sense of justice is offended." Finally, the district court received evidence of the net worth of Reserve Life reflecting such net worth to be $157,000,000. Based upon the above figure, the district court then concluded the amount of $500,000 in punitive damages was appropriate. After reviewing the record and opinion of the district court, we cannot say that the district court erred in its application of Mississippi substantive law on punitive damages to the facts of this case.

In sum, persuaded for the reasons set forth above that Reserve Life was provided with adequate notice of the type of conduct which would subject it to significant punitive damages, and that the decision of the district court to impose punitive damages in the amount of $500,000 was in accordance with well-established guidelines for the imposition of punitive damages under Mississippi law, we conclude that the guarantees afforded Reserve Life by the Due Process Clause were not violated on the facts of the instant case. In so concluding, we specifically decline to address whether the Due Process Clause may ever constrain the imposition of punitive damages in a civil case brought by private parties.[6]

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[6] Reserve Life additionally contends that the imposition of the $500,000 in punitive damages (1) violates the constitutional prohibition against ex post facto laws, (2) impairs its right to contract in violation of the federal and Mississippi constitutions, and (3) chills the funda-

As a final note, however, we observe that the policy considerations for punitive damages are well-established in the evolution of common law. "Punitive damages are an important component of the remedial side of our law whose purpose is the protection of the customer." *Crenshaw*, 483 So.2d at 278. Indeed, punitive damages may serve to deter egregious and grossly negligent conduct by overbearing or financially oppressive defendants who might otherwise proceed without any semblance of restraint in such conduct, conceivably resulting in loss of life or other significant societal injury. As stated by the Supreme Court in 1885:

> 'The law,' says Sedgwick in his excellent treatise on Damages, 'permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender.' The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice. 'We are aware . . . that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. . . .'

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mental right of access to the courts as guaranteed by the federal and Mississippi Constitutions. The ex post facto claim is without merit as acceptance of such an argument would effectively transform all evolving standards of conduct in negligent cases ex post facto laws. The contracts clause argument fails as the clause only applies to actions by the legislative authority of a state, not its judiciary. *Frazier v. Lowndes County*, 710 F.2d 1097, 1099 (5th Cir. 1983). Finally, the imposition of punitive damages does not chill the right of a litigant to access the courts as Mississippi only imposes punitive damages on an insurer who acts with gross negligence and denies a claim with no arguable basis, not on insurers who only mistakenly deny claims.

Missouri Pacific Ry., 115 U.S. at 521, 6 S.Ct. at 113 (citations omitted). Because of the harsh consequences which might ensue from such action, courts should not lightly seek to limit the imposition of punitive damages without due thought and consideration to those consequences.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-4421

PATRICIA STEPHENSON EICHENSEER,
Plaintiff-Appellee,

versus

RESERVE LIFE INSURANCE COMPANY,
Defendant-Appellant.

U.S. COURT OF APPEALS
FILED
JAN 16 1990

GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 5, 5 Cir., 1989, ___ F.2d ___)

(January 16, 1990)

Before RUBIN, POLITZ and JOHNSON, Circuit Judges

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

(✓) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stan Johnson
United States Circuit Judge
1-18-90

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

REHG-6

APPENDIX C

United States District Court,
N.D. Mississippi, E.D.

March 18, 1988.

No. EC85-415-LS-D.

Patricia Stephenson EICHENSEER,
Plaintiff,

v.

RESERVE LIFE INSURANCE COMPANY,
Defendant.

OPINION

SENTER, Chief Judge.

In this diversity action, plaintiff alleges that the defendant insurer acted with reckless disregard for her contractual rights and was grossly negligent by denying her claim for health insurance benefits. Plaintiff seeks an award of both extracontractual compensatory damages and punitive damages as a result of the defendant's actions.

A nonjury trial has been conducted, and the court now issues the following findings of fact and conclusions of law. Rule 52(a), Fed.R.Civ.P.

Findings of Fact

a) The Parties

Patricia Stephenson Eichenseer, plaintiff herein, was born on February 4, 1945, the daughter of Mr. and Mrs. Woodie Taylor. She has resided in Mississippi all her life

with the exception of a brief stay in Michigan. She presently lives with her father in the community of Westville, located in Monroe County.

The Reserve Life Insurance Company is a Texas corporation with its principal place of business in Dallas. The company is qualified to do business in Mississippi and has issued insurance policies to people in this state for many years.

b) General Background

Plaintiff is five feet six inches tall and weights 175 pounds. Her educational background is unknown but presumably includes attendance through at least the high school level. She has previously worked at the local hospital and at a pants factory in Greenwood Springs.

Plaintiff's health was excellent until 1982 when her mother passed away. As a result of the stress and anxiety accompanying this loss, plaintiff began to suffer from a multitude of ailments, including colds, high blood pressure, nervousness, depression, esophagitis, stomach and abdominal pain, and gastritis. Plaintiff visited her treating physician, Dr. L.R. Murphree, a total of eleven times during the year and was admitted to the local hospital for treatment of abdominal pain in December, 1982. Medications prescribed for her health problems included alderil, clavil, lasix, othoxicol, decatron, reglan, darvon, talwin, benedril, and mylanta. The abdominal pain which caused the plaintiff to be hospitalized was cured by administering an enema.

The Taylors first purchased health insurance from Reserve Life in 1949. One of the insureds named in the policy was Patricia, then five years old. Over the next thirty-five years, Patricia made one or two minor claims under this policy, and all were apparently paid without dispute.

Sue Wilson, an agent for Reserve Life since 1979, sold the Taylor family a medicare supplement policy in mid-1982. In late 1982, Wilson contacted the plaintiff about

purchasing her own health insurance. Plaintiff declined Wilson's offer at that time due to financial difficulties, but agreed to contact her in the near future when her financial outlook improved.

Plaintiff met with Sue Wilson again on January 5, 1983, and agreed to take out a major medical policy. While plaintiff orally responded to the application questions, Wilson wrote the answers as given. Plaintiff stated, *inter alia*, that Dr. L.R. Murphree was her treating physician, that she had not seen him in recent months, and that she was not on any medications at that time. The application also contained a medical release, executed by plaintiff, which authorized Reserve Life to contact Dr. Murphree or any other doctor to verify the condition of her health. Wilson called Dr. Murphree to see if the plaintiff had regular pelvic examinations and was told that "everything [was] fine." After making this notation on the application, Wilson collected the appropriate premium payment and informed the plaintiff that she was insured.

On January 23, 1983, eighteen (18) days after the effective date of the policy, plaintiff experienced severe pain in her lower abdomen. During a visit to Dr. Murphree the next day, the physician recommended hospitalization. On the hospital admission sheet, Dr. Murphree noted:

> *Ch[i]ef Complaint:* Pain [in] the lower abdomen.
>
> present illness: The pain has been present in the lower abdomen in period *for the last 2-3 years*. This attack started about three days ago and has become progressively worse. She has occasional headaches. The head is hurting now, some sore throat. Occasional cough which she contributes to smoking. Appetite is terrific. Bowels have not been moving well the last few days. Nicturia 2-3 times at night. (Emphasis added.)

Over the next few days, plaintiff was given antibiotics through intravenous injection. Her temperature never ex-

ceeded 100 degrees, but remained above normal (98.6°). Lab tests revealed an elevated white blood cell count of 18,000, which later declined to 9,343 with treatment.

Dr. Murphree treated the plaintiff for sixteen days before deciding to operate. In addition to prescribing antibiotics, lab reports indicate that a sonogram was performed on January 31, 1983, revealing the possible presence of an adnexal cyst, endometriosis, or pelvic inflammatory disease. A total hysterectomy was performed by Dr. Murphree on February 9, 1983. In his post-operative report, the doctor noted the presence of a) chocolate cystic ovaries, b) markedly thickened and enlarged fallopian tubes, c) pelvic adhesions, and d) displaced ovaries. A pathologist's report later confirmed that the plaintiff had also suffered from endometriosis and cervicitis.

Plaintiff's recovery was largely uneventful, and she was discharged from the hospital on February 19, 1983. In his discharge summary, Dr. Murphree reaffirmed his initial diagnosis of acute PID, but noted the presence of peritonitis, chocolate cysts, tubo-ovarian abscesses, chronic cervicitis, and massive adhesions, indicating the presence of endometriosis.[1]

Plaintiff received $6,658.35 in medical bills during the following weeks and submitted them to Reserve Life in late February for payment. Coverage under her parent's policy was never disputed, and partial payments were made

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[1] Acute pelvic inflammatory disease (PID) is an infectious condition which causes a woman's reproductive organs to become swollen and painful. The onset of the disease is, by definition, sudden. If not treated immediately, the infection can spread to other parts of the body, resulting in severe complications which may threaten the life of the patient.

Endometriosis is a malignant condition evidenced by bleeding and inflammation of a woman's uterus (or endometrien). Unlike PID, it is not an infectious disease and may be present for some time without the patient being aware of it.

by April of 1983. A majority of the bills fell under the new policy, however, and the decision of Reserve Life to deny payments under this policy gives rise to the instant dispute.

On February 28, 1983, the "Major Medical Unit" of Reserve Life's claims department received plaintiff's hospital bill. A work sheet was set up on March 2, 1983, and the file was sent to another department six days later to be examined. Plaintiff signed a "proof of claim" form and submitted it to Reserve Life on March 23, 1983. On April 21, 1983, she received payment under the old policy, but noted the absence of payment under her new policy.

c) Denial of the Claim and Commencement of Litigation

Reserve Life formally denied plaintiff's claim under her major medical policy on June 2, 1983. This decision was communicated to the plaintiff by form letter and its exact contents are unknown since both she and the insurer failed to retain a copy of the correspondence. It is undisputed, however, that the letter listed as the reason for the denial the fact that the plaintiff had a pre-existing illness which was not covered by the terms of the policy.

Plaintiff called Reserve Life on June 21, 1983, and requested an explanation for the denial. Al Vick, a Reserve Life employee, told the plaintiff that her file was still with the claims department, but that he would call her back once he had been able to find her file.

Unbeknownst to the public, Reserve Life was by mid-1983 experiencing severe organizational problems. Due to the unexpected success of a recently offered insurance policy, numerous claims were being received by Reserve Life in addition to the normal number of claims. The employees, faced with the task of matching claim correspondence with policyholders' files, often lost documents or were unable to find and file them for weeks at a time. Although the company has since computerized its operations, claims sub-

mitted in 1983 were often processed manually and mishandled.

Dena Marie Brannon was the Reserve Life employee responsible for handling plaintiff's claim. Prior to denying her claim, Brannon had obtained only Dr. Murphree's admission summary and had relied solely on the following statement to support a denial: "The pain has been present in the lower abdomen in periods for the last 2-3 years. This attack started about three days ago. . . ." Although the documents then held also listed as an admitting diagnosis "Acute PID," Brannon interpreted the reports to indicate that the plaintiff had been suffering from her illness since 1980-81. Importantly, Brannon did not consult with either the plaintiff or Dr. Murphree before making this decision and chose not to consult with an in-house physician retained by Reserve Life on a part-time basis.

Although the plaintiff made repeated telephone calls to Reserve Life during the following weeks, she received no relief. On August 22, 1983, after receiving one such call, Reserve Life employees wrote a letter to Dr. Murphree requesting plaintiff's medical records from his clinic. These records were sent to the insurer in a timely fashion, but were apparently misplaced due to the ongoing organizational crisis.

Plaintiff called Reserve Life again on September 20, 1983, to inquire about the status of her claim. The employee who talked to the plaintiff was unable to find either the file or her clinical records, but when asked if the records had been received, responded by stating that the file was still with the claims department. An exhaustive "stop search" was conducted for the records, but once again ended in failure.

Plaintiff again called Reserve Life on October 24, 1983, and asked Al Vick about her claim. Vick, unable to find the clinical records, told the plaintiff that they had been lost. Plaintiff volunteered to send additional copies to him

immediately, and Vick said that would be okay. A package containing these records was sent by registered mail to the insurer by the end of the day.

Al Vick apparently failed to inform Dena Brannon of his conversation with the plaintiff. On October 25, 1983, Brannon wrote the plaintiff a second letter denying her claim on the ground of pre-existing illness. This denial was made despite the absence of the clinical records, and neither the plaintiff nor medical authorities had been consulted in the interim. Plaintiff's plea for officials to check with her out-of-state physician was likewise rejected.[2]

Dr. Murphree's clinical records were received by Reserve Life on October 26, 1983. According to Jerry Jenkins, Dena Brannon's supervisor, no one saw the records except Brannon. Receipt of the records was not acknowledged, and Brannon failed to communicate with the plaintiff for the next five weeks. When asked to explain this performance, Jenkins explained that it was due to mismanagement.

By late 1983, hospital officials had been unsuccessful in their attempts to collect for plaintiff's hospital stay. Plaintiff's bill was turned over to a local collection agency. She began to receive telephone calls from the agency's employees at work and at home late at night. Already financially troubled, the calls at work forced plaintiff to lower her production level and incur the wrath of her supervisors for receiving personal calls on company time. Plaintiff informed Reserve Life of her troubles during her periodic telephone calls; interestingly, no mention of this

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[2] Plaintiff lived in Michigan for a brief period during 1980-82. In an attempt to show an absence of a "pre-existing illness over the past 2-3 years," plaintiff gave Al Vick the name of her doctor in Michigan on June 21, 1983, and told him to feel free to verify her statements. Apparently, this too fell on deaf ears. Neither Vick nor Dena Brennon made any effort to contact the Michigan physician.

can be found in the telephone memos contained in her claims file.

On December 13, 1983, Dena Brannon wrote the plaintiff acknowledging receipt of Dr. Murphree's clinical records. Brannon stated that Reserve Life could not consider payment of plaintiff's claim unless and until Dr. Murphree altered the hospital record to clear up the confusion over the "2-3 years" remark. Brannon further requested that the plaintiff send certified copies of the amended record to Reserve Life in order to allow a medical consultant to review her case.

Plaintiff's response to this letter was twofold. First, she asked Dr. Murphree to comply with Reserve Life's new request. Second, she informed her father of her continuing troubles, and he decided to hire an attorney to represent her.

Dr. Murphree initially declined to alter the hospital records as requested. Convinced that such a change was not ethically permissible, he instead agreed to sign an affidavit recanting the "2-3 years" remark. An affidavit to this effect was not executed, however, until July of 1984, many months later.

Plaintiff's counsel wrote a demand letter to Reserve Life on April 25, 1984, seeking either payment of the claim or an extended explanation for its denial. Counsel also offered to send any additional documents which Reserve Life desired to obtain. Reserve Life wrote to counsel on June 21, 1984, and reaffirmed its denial, attaching in support the admissions summary and clinical records previously received. In a follow-up letter dated July 10, 1984, the company repeated its request for certified copies of the hospital record to enable a medical consultant to review the record.

On July 23, 1984, plaintiff's counsel mailed to Reserve Life a notarized affidavit of Dr. Murphree which asserted that the hospital record was in error and that the state-

ment lower abdomen pain was present for "2-3 years" should read "for 2-3 days." Reserve Life received the letter and affidavit, but lost both documents over the next few weeks.[3]

Plaintiff personally delivered a copy of Dr. Murphree's affidavit to an employee of the Monroe County Hospital and asked that it be placed in the official hospital files. The employee did not refuse plaintiff's request, but it was never placed in the records of the hospital.

In October of 1984, plaintiff was again forced to enter the local hospital for treatment of an unrelated illness. Due to her prior financial troubles and the defendant's refusal to pay plaintiff's prior claims, she was forced to sign papers seeking charitable assistance to pay her bills. Plaintiff's anxiety over the mishandling of her claim increased accordingly.

On October 16, 1984, plaintiff's counsel sent another demand letter to Reserve Life. Six weeks later, a telegram dated November 29, 1984, was received from Dena Brannon in response, stating that she was "having difficulty in assembling the file" and that plaintiff's "patience in this matter is greatly appreciated."[4]

Reserve Life mailed the plaintiff a follow-up letter January 4, 1985. The insurer reaffirmed its denial of her claim and based its decision on the failure of Dr. Murphree to correct the hospital records.

Plaintiff filed the present complaint on October 4, 1985. An answer was filed by the defendant denying plaintiff's

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[3] Despite Reserve Life's protestations to the contrary, the management of the claims department leads the court to conclude that the letter and the affidavit mailed by plaintiff's counsel were in fact received and then lost.

[4] Defendant's difficulty in "assembling the file" had, at this point in time, continued over one and one-half years.

entitlement to relief. By order of the court, discovery was set to run through and including November 30, 1986.

During the course of discovery, defense counsel learned the following: (1) although plaintiff's counsel had mailed a copy of Dr. Murphree's affidavit to Reserve Life, it did not appear in the file and had not previously been considered; (2) Reserve Life's file did not contain all of the hospital records pertaining to plaintiff's stay; the omitted records were also not considered prior to denying her claim; and (3) no physician had been consulted at any time prior to denying plaintiff's claim on June 2, 1983, October 25, 1983, December 13, 1983, June 21, 1984, or January 4, 1985.

Reserve Life paid plaintiff's claim for proceeds on June 16, 1986, after reviewing Dr. Murphree's affidavit. The actual amounts paid were $6,090.35 to the collection agency and $921.00 to the plaintiff. The sums paid do not include interest.

Reserve Life has since expressed regret of its decision to pay plaintiff's claim. After deposing Dr. Murphree and consulting a medical expert, the insurer contends that plaintiff had been suffering from endometriosis for over two to three years and did not suffer from acute PID.

Plaintiff, faced with the above circumstances, decided to bring her suit to trial seeking extracontractual compensatory damages and punitive damages. Since the contract claim has already been paid, the only question facing the court is whether or not she is entitled to prevail on her remaining claims.

d) Presentation of Evidence at Trial

As in many bad faith cases, the amount of time consumed by trial was relatively minimal. Plaintiff's evidence in her case in chief consisted of medical records, expert medical testimony from two doctors, and testimony of the plaintiff herself. The insurance company responded in its

case by introducing testimony from two company employees and one medical expert. The plaintiff declined to put on any evidence in rebuttal, and the matter was taken under advisement after all post-trial motions were denied.

The court has already considered the lay testimony given in this case in making findings as to Reserve Life's claims procedures and plaintiff's concurrent responses thereto. With a few exceptions, most of the testimony in these areas was uncontested, and the court refers to the testimony of the plaintiff, Sue Wilson, and Jerry Jenkins elsewhere as appropriate. A summary of the expert medical testimony is instructive, however, and a summary of the evidence will precede the court's findings in this instance.

Two medical experts testified in plaintiff's behalf at trial. Dr. Murphree, plaintiff's treating physician, stated that he felt that the plaintiff had suffered from both acute PID and endometriosis, but surgery was necessitated by PID. Dr. Murphree based his opinion upon the visual examination performed during surgery. Dr. Perrin Smith, a licensed obstetrician/gynecologist (ob/gyn), agreed with Dr. Murphree's diagnosis, noting that symptoms caused by endometriosis would not have been present for the long length of time (almost three weeks) that plaintiff suffered. According to Dr. Smith, none of the medical records enable a physician to conclude (1) that plaintiff's attack of acute PID predated January 5, 1983, or (2) that endometriosis, if present, caused the plaintiff to undergo surgery. Dr. Smith further stated that his conclusions were based upon, and compatible with, all the hospital records including the pathologist's report.

On cross-examination, the defendant attempted to get Dr. Smith to admit that PID existed as both an acute and a chronic disease and that plaintiff's symptoms might be the result of a long-time attack of PID. Dr. Smith rejected this contention, questioning whether PID could, by definition, ever be extended or chronic in nature.

Dr. John R. Sanders, also a licensed ob/gyn, testified in behalf of Reserve Life, but admitted that he had not reviewed plaintiff's medical records until February, 1987, after suit was commenced. Dr. Sanders stated that, in his opinion, the plaintiff had suffered from endometriosis and a bilateral infection caused by chronic PID with acute complications. Dr. Sanders asserted that endometriosis is commonly misdiagnosed as PID, but this may be verified by referring to the timing of the pain. If the female suffers pain prior to her menstrual period and her appetite remains good, then endometriosis is suggested. Moreover, if a patient's fallopian tubes are enlarged, but not infected, then PID is probably not present. Dr. Sanders concluded by agreeing with Dr. Murphree and Dr. Smith in three essential respects: (1) a final medical diagnosis should not be made until after the pathology lab had reported its results, (2) if the plaintiff suffered from acute PID, then her period of disability commenced no earlier than seventy-two hours prior to entering the hospital, and (3) a woman can suffer from both endometriosis and acute PID at the same time.

Based on the foregoing, the court finds that Reserve Life did not have an arguable reason to deny plaintiff's claim until it received the hospital pathologist's report and consulted a medical expert for the proper interpretation. This occurred, by admission of Dr. Sanders, in early 1987. The court further finds that the evidence in this case makes it a likely conclusion that while the plaintiff suffered from both endometriosis and acute PID, her surgery was necessitated solely by symptoms related to the latter.

Conclusions of Law

By virtue of the citizenship of the parties and an amount in controversy exceeding ten thousand dollars, this court is vested with subject matter jurisdiction. 28 U.S.C. § 1332. Since the plaintiff resides in the Northern District of Mis-

sissippi and the claim arose in this district as well, venue lies in this court pursuant to 28 U.S.C. § 1391.

This court is *Erie*-bound to apply the law of Mississippi to resolve all questions of substantive law. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Jackson v. Johns-Manville*, 781 F.2d 394 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986). Since the "center of gravity" lies in this state with respect to all relevant issues, no choice of law questions are presented. *Boardman v. United Services Auto. Ass'n.*, 470 So.2d 1024, 1031 (Miss.1985).

A. The Development of Bad Faith Law in Mississippi[5]

Mississippi courts have faced the task of resolving insurance disputes for over one hundred forty years. *See, e.g., Natchez Insurance Co. v. Buckner*, 3 Miss. 23 (1839). Nevertheless, the law of bad faith is fairly recent in origin. Delay in the development of this field is perhaps attributable to two factors.

The first factor is derived from the general nature of contract law. Traditionally, a party was "free to break his contract if he chooses" and pay liquidated damages. This principle would be contravened if he were also subject to extracontractual and punitive damages. O.W. Holmes, *The Common Law*, 301 (1881).

The second factor is based on the general nature of common law pleading. At common law, an individual who suffered an injury from one sequence of events was said to have one "cause of action." Although he could sue

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[5] *See generally*, Freeland and Freeland, "Bad Faith Litigation: A Practical Analysis," 53 Miss. L.J. 237 (1983); W. Denton and W. Walker, *Bad Faith Litigation in Mississippi* (1981); and Hughes, "*Standard Life Insurance Company of Indiana v. Veal:* A Perpsective Look at Punitive Damages in Mississippi," 1 Miss.Col.L.Rev. 21 (1978). *See also* Comment, "Insurance Bad Faith in Mississippi: The Arguable Reason, Punitive Damages and Trial Procedure," 55 Miss.L.J. 485 (1985).

under either a tort theory or a contract theory, both claims could not be joined in the same suit, and *res judicata* prevented recovery a second time if separate suits were brought. A claimant could only recover extracontractual or punitive damages (for the torts of intentional infliction of emotional distress, gross negligence, fraud, or malice) if he was willing to waive his contract claim. Since a contract claim was easier to prove than a tort claim, most individuals opted to pursue the former. *See generally*, 5 *Corbin on Contracts*, §§ 1076-77 (1964 ed.); 2 F. Harper and F. James, *The Law of Torts*, §§ 18.6, 28.32 (1956 ed.)

In 1915, the Mississippi Supreme Court was faced with a case involving a peculiar breach of a contract. *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915). Mrs. Lena Moffett, a woman pregnant with a child, paid her physician, Dr. B.S. Hood, to attend to her at the appropriate time. When labor pains developed, a message was sent to the doctor, but he failed to arrive as requested. Mrs. Moffett's child was not born until a few days later, and she suffered no complications; nevertheless, she instituted a suit a short time thereafter for actual damages, punitive damages, and damages for mental anguish. A jury awarded Mrs. Moffett damages in the amount of $150.00.

On appeal, the Mississippi Supreme Court affirmed the jury's verdict, holding that Mrs. Moffett was entitled to both actual damages arising out of the breach as well as damages for her mental anguish. The court permitted the latter in light of evidence tending to show that Mrs. Moffett had suffered "intense and prolonged physical pain" as a result of her physician's failure to attend her when requested to do so. *Id.* 69 So. at 666. The court went on to note, however, that:

> The jury should not have been instructed . . . to award punitive damages. This is a suit for damages alleged to have been sustained because of the breach of a contract, and the rule is, with probably two excep-

> tions, and within neither of which does the case at bar come, *that such damages are not recoverable in such an action unless the act or omission constituting the breach of the contract amounts also to the commission of a tort.* This error, however, was harmless, for the reason that since the amount of damages awarded is only $150, it cannot be said that the jury responded to the instruction and included in the verdict an award for punitive damages.

Id. (Citations omitted.) (Emphasis added.) This statement is said to be the beginning of the journey toward developing a cause of action for bad faith refusals of legitimate insurance claims.

Notwithstanding the rule announced in *Hood, supra,* the state supreme court continued over the years to reject attempts by litigants to recover both contract and tort damages in the same suit. *See, e.g., Home Insurance Co. v. Tate Mercantile Co.*, 117 Miss. 760, 78 So. 709 (1918) (breach of fire insurance policy; attempt to recover for gross negligence rejected); *Potomac Ins. Co. v. Wilkinson*, 213 Miss. 520, 57 So.2d 158 (1952) (breach of auto insurance policy; attempt to recover for conversion rejected); *Laurel Auto Supply Co. v. Sumrall*, 184 Miss. 88, 185 So. 566 (1939) (breach of sales contract; election of contract or tort remedies required); *Lloyd Ford Co. v. Sharp*, 192 So.2d 398 (Miss.1966) (same); *Bryan Construction Co. v. Thad Ryan Cadillac, Inc.*, 300 So.2d 444 (Miss.1974) (same).

Two cases served as exceptions to this pattern, however. In *American Railway Express Co. v. Bailey*, 142 Miss. 622, 631, 107 So. 761, 763 (1926), a case involving the failure of a finance company to deliver the correct amount of money cabled to the plaintiff, the Mississippi Supreme Court explained that punitive damages could be available when the breach of contract was "attended by some intentional wrong, insult, abuse, or gross negligence, which amounts to an independent tort." The court applied this

rule again in 1944 in the case of *D.L. Fair Lumber Co. v. Weems*, 196 Miss. 210, 16 So.2d 770 (1944) (agreement to repair fences breached in connection with a contract for the sale of timber; cattle lost over a period of months due to deliberate indifference of the lessee).

The legislature statutorily repealed the common law rule prohibiting joinder of claims in 1974.[6] Miss.Code Ann. § 11-7-36 (Supp.1987); Miss.Laws Ch. 315, § 1 (1974). *See also* Rule 2, Miss.R.Civ.P. (1982 ed.) One year later, the decision in *Progressive Casualty Ins. Co. v. Keys*, 317 So.2d 396 (1975), was rendered wherein the court formally recognized for the first time that an insurance company could be subjected to punitive damages if the breach of contract is "attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." *Id.* at 398 (citations omitted). *See also Lincoln National Life Ins. Co. v. Crews*, 341 So.2d 1321 (Miss.1977) (same result reached in case involving potential waiver of a policy condition).

The seminal case on bad faith in this state is *Standard Life Insurance Co. v. Veal*, 354 So.2d 239 (Miss.1977). In *Veal*, the Mississippi Supreme Court held an insurance company liable for punitive damages for failing to pay a legitimate claim. The court, in explaining why exemplary damages in the amount of $25,000.00 were being awarded in this instance for the first time, stated:

> This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the

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[6] The legislature ameliorated the prohibition against joining claims for breach of a sales contract and deceit by enacting Article 2 of the Uniform Commercial Code (UCC) in 1966. *See* Miss.Code Ann. § 75-2-721 (1972); Miss.Code 1942 Ann., § 41A:2-721 (Supp.1967). *See generally Bryan Construction Co., Inc. v. Thad Ryan Cadillac, Inc.*, 300 So.2d 444, 447 (Miss.1974).

> express provisions of its own policy. . . . We are of the opinion that the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort as contemplated in *Progressive Casualty Insurance Company v. Keys, supra.* Of course, *if an insurance company has a legitimate or an arguable reason for failing to pay a claim, punitive damages will not lie.* . . .

Id. at 248 (emphasis added).

Subsequent decisions have clarified what constitutes "legitimate or arguable reason." As Justice Robertson noted in a separate opinion in *Blue Cross and Blue Shield of Mississippi v. Campbell,* 466 So. 2d 833 (Miss.1984),

> An arguable reason is one in support of which there is some credible evidence. There may well be evidence to the contrary. A person [or insurer] is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he [or it] acts.

Id. at 851.

The Mississippi Supreme Court has also addressed the question of what conduct amounts to an independent and intentional tort.

> The absence of an arguable reason . . . does not lead inexorably to an assessment of punitive damages. This is because . . . the substantive test for awarding punitive damages is the same in bad faith refusal cases as in any other case where punitive damages are sought. That test requires the plaintiff to show *some willful or malicious wrong or the gross or reckless disregard for the rights of others.*

Weems v. American Security Ins. Co., 486 So.2d 1222, 1226-27 (Miss.1986). Stated another way,

> To recover punitive damages from an insurer for amounts over and above policy benefits, an insured must prove *by a preponderance of the evidence* either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others.

Aetna Casualty and Surety Co. v. Day, 487 So.2d 830, 832 (Miss.1986). *See also Blue Cross and Blue Shield of Mississippi, Inc. v. Maas*, 516 So.2d 495, 498 (Miss.1987); *Mutual Life Insurance Company of New York (MONY) v. Wesson*, 517 So.2d 521 (Miss.1987).

Punitive damages are allowed under certain circumstances in order to (1) punish the wrongdoer for engaging in egregious conduct and (2) to deter the wrongdoer and others similarly situated from committing the same acts in the future. *See Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972). As the court noted in *Veal, supra*,

> If an insurance company could not be subjected to punitive damages, it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impugnity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Id. at 248.

The Mississippi Supreme Court first affirmed an award of punitive damages against an insurer in 1977. *Standard Life Insurance Co. v. Veal, supra.* Although a number of decisions have been rendered since then which also af-

firmed such assessments,[7] the rules derived from these cases have often appeared inconsistent or contradictory. *Compare Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss.1985), and *Reserve Life Insurance Company v. McGee*, 444 So.2d 803 (Miss. 1983), *with Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984). *See generally* Comment, 55 Miss.L.J. 485 (1985).

Mississippi may also permit an aggrieved claimant to recover extracontractual (i.e., tort) compensatory damages if the insurer acted without an arguable reason and in bad faith. Although the state supreme court has yet to directly decide the issue, several rulings have implied that such a remedy is available. *See, e.g., Blue Cross and Blue Shield of Mississippi, Inc. v. Maas*, 516 So.2d 495 (Miss.1987) (Robertson, J., concurring, joined by a majority consisting of Lee, Prather, Anderson, Griffin, and Zuccaro, J.J.); *Pioneer Life Ins. Co. of Illinois v. Moss*, 513 So.2d 927, 931

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[7] The Mississippi Supreme Court has affirmed punitive damage assessments in the following cases: *Standard Life Insurance Co. v. Veal*, 354 So.2d 239 (Miss.1977); *Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829 (Miss.1979); *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803 (Miss.1983); *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss.1985); *Southern United Life Insurance Co. v. Caves*, 481 So.2d 764 (Miss.1985); *National Life and Accident Insurance Co. v. Miller*, 484 So.2d 329 (Miss.1985); *Mississippi Farm Bureau Mutual Insurance Co. v. Todd*, 492 So.2d 919 (Miss.1986); *Blue Cross and Blue Shield of Mississippi, Inc. v. MAAS*, 516 So.2d 495 (Miss.1987); *Mutual Life Insurance Company of New York v. Wesson*, 517 So.2d 521 (Miss.1987); *Life Insurance Company of Mississippi v. Allen*, 518 So.2d 1189 (Miss.1987).

See Comment, 55 Miss.L.J. 485, 496 n. 55 (1985). Sitting in a diversity context, federal district courts have awarded punitive damages, or have had such awards affirmed, in the following cases: *Richards v. Allstate Insurance Co.*, 693 F.2d 502 (5th Cir. 1982); *Henderson v. United States Fidelity & Guaranty Co.*, 695 F.2d 109 (5th Cir.1983) (*Henderson II*); *Jones v. Benefit Trust Life Ins. Co.*, 617 F.Supp. 1542 (S.D.Miss.1985), *affirmed in relevant part*, 800 F.2d 1397 (5th Cir.1986).

(Miss.1987) (Robertson, J., concurring, joined by Prather and Anderson, JJ.); *Aetna Casualty and Surety Co. v. Day*, 487 So.2d 830, 835 (Miss.1986); *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 299 n. 18 (Miss.1985) (Robertson, J., dissenting, joined by Walker, P.J., and Prather, J.); *State Farm Fire and Cas. Co. v. Simpson*, 477 So.2d 242, 253 (Miss.1985); *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 847 (Miss.1985) (Robertson, J., specially concurring with the denial of the petition for rehearing, joined by Prather and Anderson, JJ.); *Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829, 836 (Miss.1979); *Bellefonte Insurance Co. v. Griffin*, 358 So.2d 387 (Miss.1978). *See also Tutor v. Ranger Insurance Co.*, 804 F.2d 1395 (5th Cir.1986) (applying Miss. law); *Jones v. Benefit Trust Life Ins. Co.*, 617 F.Supp. 1542, 1545-50 (S.D.Miss.1985), *reversed in relevant part*, 800 F.2d 1397 (5th Cir.1986) (same); *Davidson v. State Farm Fire and Casualty Co.*, 641 F.Supp. 503, 511 (N.D. Miss.1986) (same); *Horton v. Hartford Life Ins. Co.*, 570 F.Supp. 1120 (N.D.Miss.1983) (same); *Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 376 (5th Cir. 1982) (same).

In *Blue Cross and Blue Shield, supra*, the court noted that "in a proper punitive damages case in this state, it has long been recognized [that] the jury may consider in making a punitive damage award, the emotional distress and even attorney's fees of the plaintiff." *Id.* at 845. Hence, even if an award of extra-contractual compensatory damages is not *per se* permissible, state law still allows the trier of fact to consider the claimant's economic and emotional losses when assessing punitive damages.[8]

Under certain circumstances a plaintiff may likewise be entitled to an award of attorney's fees incurred in con-

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[8] In *Maas, supra*, a majority of the Mississippi Supreme Court agreed that "[w]hether such awards [are] considered as components of economic loss tort damages, or as [separate and distinct] awards required by other law, matters not." 516 So.2d at 498.

nection with the bad faith refusal of his claim. The court in *Simpson, supra*, explained that attorney's fees are not recoverable unless the insurer's actions are so grossly or willfully wrong as to justify the infliction of punitive damages. *Id.* at 253. *See also Harrison v. Benefit Trust Life Insurance Co.*, 656 F.Supp. 304, 309 (N.D.Miss. 1987).[9] Thus, if a claimant shows that he or she is entitled to punitive damages, then an award of attorney's fees may be appropriate as well.[10]

The final component of any recovery is an award of prejudgment interest. Absent a statutory provision, pre-

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[9] In an opinion written by Judge Biggers, this court in *Harrison* observed that "attorney's fees should be allowed in insurance contract actions for an insurer's wrongful denial of a claim, *independent* of any bad faith allegation." 656 F.Supp. at 309 (emphasis added). *See also Donahoo v. State Farm Mutual Automobile Ins. Co.*, No. GC86-18-NB-O (N.D.Miss.1987) (unpublished opinion). Over the years, Justice Robertson has attempted to persuade a majority of his brethren on the Mississippi Supreme Court to either provide attorney's fees to claimants who have prevailed on their contract claim, or establish an intermediate level of conduct which would entitle a claimant to relief short of punitive damages. *See Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 847 (Miss.1984); *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 299 n. 18 (Miss.1985). The wisdom in Robertson's approach is apparent.

An alternative approach has also been suggested by Judge Hawkins. *See Reserve Life Insurance Co. v. McGee*, 444 So.2d 803, 819 (Miss.1983) (Hawkins, J., dissenting) (noting that legislative action might be appropriate to limit recovery in insurance cases to "actual expenses [incurred] in bringing suit plus double or triple the sum found to be due under the policy)."

[10] As noted previously, the court in *Blue Cross and Blue Shield, supra*, intimated that a plaintiff could recover attorney's fees (and extracontractual damages) within the context of an award for punitive damages. Although this distinction appears to be in conflict with the definition of punitive damages (which are designed to punish, not compensate), the court deems this to be irrelevant to the result reached herein. *Cf. Maas, supra*, at 498. Predictably, the adoption of a statute or rule creating a right to attorney's fees, etc., will cause a concomitant decrease in the rising rate of "bad faith" litigation confronting the courts.

judgment interest is allowable at the court's discretion if (a) the claim is for a liquidated amount or (b) the refusal to pay is accompanied by bad faith conduct sufficient to support an award of punitive damages. *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 300 (Miss.1985) (Robertson, J., dissenting); *Stanton and Associates, Inc. v. Bryant Construction Co., Inc.*, 464 So.2d 499, 502 (Miss.1985); *Dunnam v. State Farm Mutual Automobile Insurance Co.*, 366 So.2d 668, 672 (Miss.1979); *Home Insurance Co. v. Olmstead*, 355 So.2d 310, 314 (Miss.1978). *See also Cabell Electric Co. v. Pacific Insurance Co.*, 655 F.Supp. 625, 630-31 (S.D.Miss.1987).

If an insurance company denies a claim, it may be liable for prejudgment interest since the amount in most cases is liquidated. *See, e.g., Davis v. Continental Casualty Co.*, 560 F.Supp. 723, 730 (N.D. Miss.1983); *Western Line Consol. Sch. Dist. v. Continental Casualty Co.*, 632 F.Supp. 295 (N.D.Miss.1986). Even if the underlying contract claim is paid prior to trial, the insurer may be liable for prejudgment interest on the amount from the time the claim reasonably should have been paid[11] and the time it actually was paid. If, as in the case *sub judice*, the plaintiff proceeds to trial seeking extracontractual and punitive damages, the insurer may find itself assessed with prejudgment interest on the unliquidated claims if the element of bad faith is present. In other words, by proving an entitlement to punitive damages, a plaintiff opens up the possibility of getting prejudgment interest; this exposure is not neces-

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[11] As Justice Robertson indicated in his dissent in *Crenshaw*, "The insurer, of course, is entitled to a reasonable period of time within which to investigate and process a claim. This is wholly consistent with the insurer's duty to pay with reasonable promptness. I would hold that prejudgment interest on all first party insurance claims should begin to run thirty days following the insurer's receipt of the proof of claim, unless the equities of a given case clearly indicate that the commencement date should be later." 483 So.2d at 300-01.

sarily mitigated by the insurer's decision to pay off the claim in an untimely fashion prior to trial.[12]

B. An Insurer's Duty to Adequately Investigate a Claim Prior to Denying It

The mere fact that an investigation of a claim is deficient or incompetent is not sufficient to render the insurance company liable for punitive damages. *Fedders Corp. v. Boatright*, 493 So.2d 301, 312 (Miss.1986); *Bellefonte Insurance Co. v. Griffin*, 358 So.2d 387, 391 (Miss.1978). This is true even where an underwriter could have done more, *O'Connor v. Equitable Life Assurance Society of the United States*, 592 F.Supp. 595, 598 (N.D. Miss.1984), or where clerical mistakes resulted in a negligent denial of a claim. *Consolidated American Life Insurance Co. v. Toche*, 410 So.2d 1303, 1306 (Miss.1982).

Nevertheless, Mississippi law imposes a clear duty upon an insurance company to promptly[13] and adequately investigate an insured's claim before denying it. An insur-

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[12] As always, the court is mindful of its role under *Erie*. To the extent that the Mississippi Supreme Court has remained silent on the issue of prejudgment interest, the statements contained herein represent merely an "*Erie*-guess" as to what the high court would do if presented with the question. This approach is followed throughout this opinion in all areas where guidance has not been forthcoming or the law unambiguously stated.

[13] Mere delay in investigating a claim will not support an award of punitive damages under Mississippi law unless it is (a) so unreasonable as to constitute an independent tort or (b) amounts to a constructive denial of the claim, made without an arguable reason and in bad faith. *Tutor v. Ranger Insurance Co.*, 804 F.2d 1395, 1398-99 (5th Cir.1986) (applying Miss. law); *Aetna Casualty and Surety Co. v. Day*, 487 So.2d 830, 833 (Miss.1986). *See also Reece v. State Farm Fire and Casualty Co.*, No. EC85-433-D-D (N.D.Miss. 1987) (unpublished supplemental opinion dated Dec. 22, 1987). Most insurance companies, including Reserve Life, have enacted internal policy guidelines which give the insured a right to a prompt and objective investigation of his or her claim.

ance company must, at a minimum, (1) check to see if the policy provision relied upon to deny the claim has been held invalid and unenforceable by a state or federal court, *see Employers Mutual Casualty Co. v. Tompkins*, 490 So.2d 897 (Miss.1986); *see also Richards v. Allstate Insurance Co.*, 693 F.2d 502 (5th Cir.1982) (applying Mississippi law); (2) interview its employees and agents to ascertain if they possess any relevant knowledge regarding the claim in question, *see Merchants National Bank v. Southeastern Fire Insurance Co.*, 751 F.2d 771 (5th Cir.1985) (applying Mississippi law), and (3) if the claim is related to the plaintiff's health, then make reasonable efforts to obtain all available medical information relevant to the claim, *see Life Insurance Co. of Mississippi v. Allen*, 518 So.2d 1189 (Miss.1987); *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 271-73 (Miss.1985); *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984); *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803 (Miss.1983).

What constitutes a "reasonable effort" to obtain "all available medical information?" This question has been, and will continue to be, decided on a case-by-case basis. A review of the relevant case law is, therefore, instructive.

Reserve Life v. McGee

In September of 1980, Henry McGee was admitted to a hospital for urinary tract problems. After an examination revealed a lesion on McGee's bladder, doctors operated and removed the lesion and released McGee nine days later. Medical analysis determined that the lesion had a short existence prior to its removal.

In December of 1980, McGee was again hospitalized for an inflamed bladder. No evidence of lesion recurrence was found, and treatment of the inflammatory condition was successful. McGee was discharged five days later.

McGee had purchased his medical and hospitalization insurance from a Reserve Life agent in early 1980. Al-

though McGee submitted the proper loss forms to Reserve Life after his September and December hospitalizations, by January 21, 1981, he found his claims remained unpaid because "his files were incomplete" and Reserve Life's investigation was still pending. On February 12, 1981 Reserve Life formally denied the claim on the grounds that material misrepresentations made by McGee entitled to void the policy *ab initio.*

The trial was held in November of 1981. McGee received a jury verdict of $2,416.00 in contract damages and $158,000.00 in punitive damages. By rendering such a verdict, the jury necessarily found that (1) the misrepresentations, if any, were not material to the issuance of the policy, (2) the denial was contrary to the terms of the policy, (3) Reserve Life intentionally denied McGee's claims, (4) Reserve Life did not have a legitimate or arguable reason to support its denial, (5) the actions of Reserve Life were wanton, malicious, grossly negligent, or evidenced reckless disregard for McGee's rights, (6) McGee should have received, pursuant to the policy provisions, $2,416.00 for his medical expenses, and (7) an assessment of $158,000 would serve to punish Reserve Life for its actions and deter it and others from repeating such conduct in the future.[14]

On appeal, the Mississippi Supreme Court affirmed. Chief among the appellate court's considerations were the trial court observations that (a) McGee was an uneducated man, easily led and imposed upon, (b) a "glib talking salesman" with a substantial commission to be earned "talked through" the application with McGee, asking all the questions, while in McGee's own home, (c) Dr. Edgar Bobo was McGee's personal physician at the time the application

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[14] Later in this opinion, I note the failure of this case to "deter such conduct in the future." Indeed, the *manager* of the claim department of Reserve Life was not even familiar with the facts forming the basis for the punitive damage award in *McGee.*

was filled out, and this fact was made known to Reserve Life, (d) Reserve Life was given permission to communicate with Dr. Bobo and to obtain all relevant data concerning his prior medical history, (e) simple communications with Dr. Bobo would have revealed any prior transient ischemic attacks which were alleged to be the basis of the misrepresentation in question, (f) the prior transient ischemic attacks had nothing to do with plaintiff's bladder cancer for which benefits were claimed under the policy, (g) notwithstanding the receipt of written permission, Reserve Life wrote the policy without communicating in any way with Dr. Bobo, (h) any misrepresentations by McGee were innocent ones, (i) Reserve Life waited until a claim was filed but then utilized its permission to conduct an intensive investigation of McGee's prior medical history, and (j) Reserve Life received and kept monthly premiums for five months after the claims were made before rejecting them. 444 So.2d at 811. The court also noted that the trial judge had commented as follows:

> Hospital and medical insurance is absolutely essential in this era of astronomical medical costs. [McGee] cannot now obtain such insurance. Quite likely he could have obtained such insurance at an increased premium at the time the application was made and the time Reserve Life evaluated this risk, even if the transient ischemic attacks came into light. To allow Reserve Life to "sandbag" and gloss over its investigation of [McGee's] medical history at the time of evaluating the underwriting risk, then comb intensively for five months his prior records after a claim is made "looking for a defense" (even based on a condition unrelated to his benefit claim) and then deny coverage "in good faith" is to invite manifest abuse of the public in such relationships. Under such circumstances punitive damage awards provide the public with its best protection from such abuse of this relationship between insured and insurer.

Id.

Justice Robertson amplified upon the trial judge's concerns in a separate concurring opinion.

> At the time of the application, McGee disclosed the name of [his personal treating physician]. He also executed the proper form authorizing [his doctor] to release to Reserve any information requested by Reserve. I would hold that, as a matter of law, *where an insured does this in his application for insurance, the insurance company is charged with knowledge of all information in the doctor's records and everything the doctor may personally have remembered about the applicant.*
>
> * * *
>
> *I would hold that, at the time it accepted the risk and issued the policy in question, Reserve is deemed to have known what its later investigation* [*via*] *McGee's doctor*] *revealed.*
>
> It seems to me that insurance companies ought to be happy with this approach. By checking with prior treating physicians, they can obtain accurate medical history of an insurance applicant. Few laymen are able to describe fully their medical history. This is particularly so in the case of one like Mr. McGee who has only a third grade education. McGee's disclosure of his prior relationship with [his doctor] gave Reserve access to better information than it would have had if McGee had stumbled through his personal recollections of his medical history.

Id. at 816 (emphasis added).

Although *Reserve Life v. McGee* deals with a material misrepresentation defense and is, therefore, factually distinguishable from the case at bar, the same concerns which prompted the above-quoted comments are present here as well.

When Reserve Life received Ms. Eichenseer's claim, it was faced with an insured who had basic schooling, but was unsophisticated with respect to insurance matters. Although she personally attempted to comply with the demands of the defendant, Ms. Eichenseer found herself overwhelmed and, of course, unpaid. It was only through the efforts of her attorney that the contract portion of her claim was eventually paid.

Finally, the court notes that Reserve Life's initial investigation of Eichenseer's claim took four months, and it continued to reevaluate its position through trial. In *McGee*, the investigation took five months.

Blue Cross and Blue Shield v. Campbell

William T. Campbell applied for hospitalization insurance from Blue Cross on October 2, 1980. On October 16, 1980, Blue Cross accepted Campbell's application and issued him a policy as requested.

In filling out the application, Campbell stated he had never been treated for alcoholism or ulcers. On the face of the application, coverage for "care or treatment during the first twelve months after the effective date of the contract" was excluded if it was the result of "causes existing prior to the effective date of the contract." . . .

On December 3, 1980, six weeks after the policy became effective, Campbell was admitted to a Greenville hospital for acute alcoholic pancreatitis. Total charges amounted to $8,210.87, with roughly one-half thereof related to drug charges. One of the drugs administered during Campbell's stay was Halchol, a sedative often prescribed for patients suffering from alcohol withdrawal.

Upon receipt of Campbell's claim, Blue Cross immediately turned the matter over to its medical staff. In February and again in March of 1981, staff members twice requested that the hospital send Campbell's medical his-

tory, physician, and discharge summary to Blue Cross for review. After receiving the discharge summary, the insurer denied Campbell's claim based upon statements in his discharge summary which indicated that his hospitalization might have been caused by a preexisting drinking condition.

Campbell was again hospitalized on April 28, 1981, for "acute pancreatitis, acute gastritis, a urinary tract infection, and a possible duodenal ulcer, active." Campbell was discharged on May 11, 1981, but not before accumulating additional charges amount to $2,823.28.

On May 21, 1981, Blue Cross received another copy of Campbell's claim for his first hospitalization. Although it was the same in all material respects, a barely discernible line appeared to be drawn through, or at the bottom of, the diagnosis "acute alcoholic" and further typed over it a new diagnosis, "acute pancreatitis." The notation "CORRECTIVE BILLING/Wrong Diagnosis Submitted" appeared across the face of the copy in someone's handwriting.

Blue Cross declined to reverse its decision to deny benefits for the first hospitalization based on the failure of hospital officials to formally correct the official hospital records.

Campbell was hospitalized a third time, from June 16, 1981, to June 22, 1981, for continued treatment of his pancreatitis and ulcer. The total charge for this visit was $1,514.50. Although the final diagnosis for this hospitalization was listed as "acute pancreatitis, small duodenal ulcer," "alcohol abuse" was listed under the headings of "secondary diagnosis" or "complications."

In July of 1981, Campbell hired an attorney in an attempt to resolve the matter. After receiving a letter from Campbell's attorney and reviewing an accompanying note from a hospital physician, Blue Cross paid the three hos-

pitalization bills. Campbell's attorney, however, deemed this attempt at satisfaction to be insufficient and demanded an additional sum of roughly $3,000.00 for extracontractual expenses incurred in connection with attempting to collect benefits. Blue Cross denied this request, and suit was commenced in October of 1981.

The trial of Campbell's claim was conducted on November 19, 1982. The jury returned a verdict in Campbell's favor for $10,000.00 actual damages, but denied the claim for punitive damages.

On appeal, the Mississippi Supreme Court reversed the jury's verdict as to contractual damages and rendered a verdict in favor of Blue Cross. In affirming the decision not to grant punitive damages, the court stated:

> Why should Blue Cross be faulted for rejecting this claim? If a hospital wants to be paid for a claim in which its own hospital records cast a serious doubt, *the hospital* should take the appropriate steps to see that Blue Cross is furnished with records or reputable medical opinion that the hospitalization was not *for* or a *result* of any ailment or disease or physical condition existing at or before the inception of a six-week-old insurance policy.
>
> The uncontradicted testimony in this case is that the Blue Cross *medical staff* reviewed this claim and came to the conclusion, from the *records submitted*, this claim was excluded under the policy. Where is there any proof they acted arbitrarily or with caprice.

466 So.2d at 840 (emphasis added.)

Although the court appears to place a duty on the hospital in insurance cases to submit complete and unambiguous records, the key distinction in the facts recited above is that Blue Cross immediately referred Campbell's claim to qualified medical officials (a licensed physician and five registered nurses) for review. Blue Cross's decision to deny

a claim based on a preexisting illness was supported by both competent medical opinion and ambiguous hospital records.

By contrast, the court notes that Reserve Life failed to obtain a medical opinion in the case at bar until after suit was commenced.

Bankers Life v. Crenshaw

Lloyd M. Crenshaw, a 61-year-old white male, injured his right foot on January 6, 1979, while working on a carburetor in his garage. Two days later, still suffering pain, Crenshaw went to a hospital emergency room for treatment. He was given medications and told to stay off his feet as much as possible.

Crenshaw's pain increased significantly over the next two days. During a second visit to the hospital, x-rays were taken, a blood test administered, a splint was put on his leg, and Crenshaw was given crutches. Two more visits followed, to the same effect.

On Sunday, January 14, 1979, Crenshaw was admitted to the hospital and reexamined. By this time, his foot was swollen, with red streaks progressing up his leg, and his toes were blue. Pulses were not palpable, and a white blood cell count was elevated.

On January 18, 1979, Crenshaw was admitted to surgery and had his right leg amputated below the knee. The final diagnosis, reflected in the hospital records, showed (1) anterior compartment syndrome, right leg, and (2) ischemic of the right leg.

On April 9, 1979, Crenshaw submitted his claim to Bankers Life along with a medical authorization for the insurance company to obtain all medical information it needed from any physician or hospital. The narrative summary, operation report, and the pathology report were also attached to this claim.

Bankers Life concluded its investigation in July of 1979. In September, 1979, Crenshaw was informed that his claim was denied due to the presence of a preexisting condition (severe arteriosclerosis of the lower right leg). Although Crenshaw continued to seek a reversal of this decision, informal efforts were unsuccessful. On November 10, 1980, Crenshaw filed suit seeking contractual and punitive damages.

After a trial in December, 1981, a jury returned a verdict in Crenshaw's favor in the amount of $20,000.00 actual damages and $1,600,000.00 punitive damages. In affirming the jury's decision, the Mississippi Supreme Court rejected an absolute rule that reliance upon a medical opinion obtained in good faith provided an insurer with an arguable reason for denial of a claim as a matter of law.

Testimony at trial indicated that Bankers Life referred Crenshaw's claim to its in-house medical director, Dr. Nathaniel P. McParland, for initial review. Prior to the denial, Dr. McParland opined that Crenshaw's leg amputation was unrelated to his recent foot trauma. This diagnosis was based upon a review of Crenshaw's medical records. Dr. McParland did not examine Crenshaw personally nor did he contact his treating physician, Dr. Christopher T. Westphal.

Dr. Westphal testified that Crenshaw's leg amputation was caused by preexisting circulatory problems in his leg which were exacerbated by the January 6, 1979, trauma. Dr. Westphal also was of the opinion that

> while the documents seen by Dr. McParland would give a general idea as to what was wrong with [Crenshaw] and what had happened to him, they were not sufficiently accurate to make many judgments concerning [his condition]. The physician needed to go specifically to the entire medical records, not simply the summary. The pathology report was insufficient . . . and also inaccurate as to the location of the am-

> putation. There was also a discrepancy in the pathologist's finding upon a visual inspection of the blood vessels as normal, while the microscopic diagnosis revealed severe atherosclerosis of arteries and gangrenous necrosis. . . . [S]ome clinical observation should have supported the microscopic diagnosis.

483 So.2d at 266.

In addition to Dr. Westphal, Crenshaw also called a second licensed physician, Dr. Perry T. Hockaday, to testify in his behalf. Dr. Hockaday concurred with Dr. Westphal's opinion that Crenshaw's amputation was a result of his foot injury. He likewise agreed with Dr. Westphal in noting the incomplete nature of Dr. McParland's records; neither the emergency room report nor the admitting examination report of January 14, 1979, were reviewed by Dr. McParland before he rendered his opinion.

> In making a determination of whether there was an arterial occlusion independent of any trauma or whether trauma played some part in the problem, Dr. Hockaday testified the entire medical record needed to be examined, not just portions of it as seen by Dr. McParland. Of utmost importance to Dr. Hockaday was the emergency room report, which documented an injury of some type to Crenshaw, distinguishing him from someone who simply came in off the street with a need to have his leg amputated.

483 So.2d at 265.

The Mississippi Supreme Court affirmed the jury's award of punitive damages, noting that Bankers Life claims officials failed to (a) interview the attending physician personally, (b) obtain a photocopy of the physician's records, (c) obtain photocopies of complete hospital records, including EKG reports, and (d) interview the insured (Crenshaw). The court stated:

> There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records. Instead, relying on the three medical entries Crenshaw sent with his claim, his claim was denied. There is no dispute that these medical documents did not tell the complete story of Crenshaw's problems. It is also clear to this court that what Crenshaw did send was sufficient to *either justify payment of his claim, or at least require Bankers Life to make a full and thorough investigation, interview Crenshaw and his family, look at all of his medical records, and interview his doctors before his claim was denied.*

483 So.2d at 270 (emphasis added). As an alternative basis for its decision,[15] the court noted that Bankers Life denied Crenshaw's claim in reliance upon an invalid policy provision; this was likewise deemed sufficient to support an award of punitive damages.

Bankers Life is the case most analagous to the one at bar. Reserve Life received an incomplete set of medical records, failed to interview either the plaintiff or her doctors, and declined to submit the matter to in-house medical personnel for review. Like Bankers Life officials, Reserve Life employees told the plaintiff that if she had any further information she could submit it for review. In both cases, the insurer assumed "no responsibility [for] checking the facts further. . . ." 483 So.2d at 273.

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[15] Some commentators have implied that the holding in *Bankers Life* may only be harmonized with *Blue Cross* if it is viewed as an "invalid policy provision" case rather than a "preexisting condition/reliance on medical opinion" case. *See, e.g.*, Comment, 55 Miss.L.F. 485, 497 n. 57 (1985). Although this approach is tempting, this court shall continue to interpret *Bankers Life* as it presently stands. Bankers Life officials may have in fact relief on a policy provision invalidated in *Peerless Insurance Co. v. Myers*, 192 So.2d 437 (Miss.1966), but this is open to legitimate dispute. *Cf. Bankers Life*, 483 So.2d at 291 (Robertson, J., dissenting).

Life Insurance Company of Mississippi v. Allen

Isom D. (Buddy) Allen purchased a 1977 Chevrolet Corvette from a used car dealer in August of 1981. Included in the installment sale contract was a requirement that Allen purchase credit disability insurance from the Life Insurance Company of Mississippi (hereinafter referred to as Life of Mississippi).[16] Allen paid an initial premium of $355.88 plus interest and was immediately insured.

The terms of the Life of Mississippi policy expressly excluded coverage for any loss caused by a condition or illness which existed prior to the effective date of the policy, August 17, 1981. Allen had previously broken his collarbone in mid-1980, but had reached maximum medical recovery sometime between December, 1980, and November 1981, according to the testimony of his treating physician, Dr. J. Elmer Nix. Allen also pulled a muscle in his left arm and shoulder sometime after purchasing the Life of Mississippi policy, but was absent from work for only one week. Both the 1980 collarbone injury and the 1981 muscle pull had completely healed by early 1982.

On February 9, 1982, Allen suffered a separated shoulder while working on an oil rig. He underwent surgery one month later and remained disabled for six months thereafter. Allen submitted a claim to Life of Mississippi on March 31, 1982, and subsequently filed four more claims during the following months. Life of Mississippi claims adjuster Jeannie Covey denied Allen's claims on the ground that his injury was related to his 1980 injury, which was a preexisting condition not covered by the policy. Significantly, Covey based her opinion solely upon her personal interpretation of Allen's medical records. Covey never con-

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[16] Life Insurance Company of Mississippi merged with the Sunbelt Life Insurance Company on January 1, 1982, and the former assumed all contracts, assets, and liabilities of the latter. *Allen, supra*, at 1191, n. 2.

tacted Allen's physician or any other medical authority prior to denying his claim.

Suit was commenced by Allen on September 8, 1982. The case went to trial in September of 1983, and the jury awarded Allen a verdict for $2,410.04 in contract damages and $20,000.00 in punitive damages. A remittitur of the punitive damage award was later ordered by the trial court, reducing the assessment to $10,000.00.

On appeal, the Mississippi Supreme Court reversed the remittitur and affirmed the jury's original award. Noting that the $20,000.00 figure was "considerably more modest than many [it had] reviewed in recent years," the court found that the record amply supported a finding that Life of Mississippi's actions were "grossly neglectful." The court explained its decision as follows:

> Making Life of Mississippi's conduct more egregious, claims adjuster Covey didn't even bother to check with Dr. Nix or any other physician before denying the claim. This could have been done with a simple phone call or letter.

518 So.2d at 1193. The court further noted that the jury may have chosen to disregard Covey's protestations to the contrary and find that "when Allen attempted to call [her] and discuss the matter, she hung up on him and refused to talk." *Id.*

The facts in *Allen* closely parallel those in the case *sub judice*. Both cases involve denials based on preexisting conditions which were unsupported by competent medical authority. Moreover, in each case, the insured was faced with a company official who was less than responsive to his or her inquiries.

In view of the decisions in *Allen, Reserve Life, Blue Cross,* and *Bankers Life,* it is difficult to conceive how Reserve Life can justify its actions. A "reasonable effort" to obtain "all available medical information" was not made

in the instant case. The actions of Reserve Life, when considered as a whole, amounted to gross negligence and reckless disregard for the rights of its insured. An arguable reason to deny Ms. Eichenseer's claim did not exist at any relevant point in time.

C. An Insurer's Ongoing Duty To Reevaluate Its Position

An insurance company is under a continuing duty to reevaluate its position when it chooses to deny a claim. This is because an insurer may be subject to punitive damages for initially denying a claim without an arguable reason, even if it later decides to pay.

A court must look to the reason an insurance company gives to an insured for denying the claim; the issue is not the defense which the insurer settles on at trial to defend the suit. *Bankers Life*, 483 So.2d at 273. This is harmonious with the corollary, under Mississippi law, that an entitlement to contractual damages is a prerequisite to receiving an award of punitive damages.

In the case *sub judice*, Reserve Life would have been justified in delaying a final decision on plaintiff's claim if it had used the additional time to further investigate her prior medical history and the facts surrounding her hospitalization. Although the initial denial of her claim on June 2, 1983, may have been the result of mere negligence, the decision to repeatedly deny her claim until after suit was filed is the result of more than simple negligence. Had Reserve Life reevaluated its position earlier and paid plaintiff's claim, a punitive damage award might not have been appropriate.

D. Calculating an Award of Punitive Damages Under Mississippi Law

Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to the following objectives: (a) punish-

ing the wrongdoer for his actions, (b) deterring the wrongdoer from engaging in such conduct in the future, (c) deterring others from engaging in such conduct in the future by making an "example" out of the wrongdoer, and (d) rewarding the injured party for bringing suit, thereby protecting the public from future wrongdoing. Factors to be considered in arriving at a final amount include, *inter alia*, the degree of the offense, the presence or absence of malice, the motive behind the actions, the injury intended, and the public sense of justice and propriety. Although a wrongdoer's financial net worth is important, whether he has been sued for punitive damages before is likewise relevant. *See generally Mutual Life Insurance Company of New York v. Wesson, supra; Blue Cross and Blue Shield v. Maas, supra*, at 496-497; *Bankers Life and Casualty Co. v. Crenshaw, supra.*

In the case *sub judice*, organizational mismanagement and lack of adequate supervision over claims personnel resulted in a wrongful denial of plaintiff's claim. The recent installation of a computer system may have resolved a lot of the defendant's problems, but the egregious wrong committed in this case remains.

Legal research by both the court and the parties reveals only one prior instance where Reserve Life was assessed punitive damages in this state. In *Reserve Life Insurance Company v. McGee, supra*, the insurer was assessed a total of $158,000.00. Importantly, Jerry Jenkins, the manager of the major medical unit of Reserve Life's claims department, admitted during cross-examination that he had heard of the *McGee* case, but was not familiar with it. Jenkins has been with Reserve Life's claims department for twenty-one years and was with the company when the *McGee* decision was handed down in 1983. Obviously, the punitive award in *Reserve Life v. McGee* did not get the attention of Reserve Life and had little, if any, deterrent effect.

As noted before, Reserve Life expressed regret at trial for its decision to pay plaintiff's claim. Moreover, the amount actually tendered did not include interest for the three year period of delay.

A finding of malice on Reserve Life's part is not supported by the record. Nevertheless, the motive behind the insurer's actions was clear; it intended to save money by denying a claim. The injury clearly foreseeable, if not intended, was the impairment of plaintiff's ability to manage her affairs. If an insurer uses its superior position to wrongfully deny a claim under a policy, the public sense of justice is offended.

Much has been said concerning the propriety of awarding punitive damages in insurance cases. Juries in the state started awarding relative conservative amounts in the late seventies, but recent awards have exceeded a million dollars. This trend corresponds with the growing net worth of some insurance companies and the fact that many companies have never been subject to an award of punitive damages in this state.

Reason and logic must govern the calculation of any punitive damage award. In the instant case, Reserve Life has tendered a financial statement listing its net worth at roughly $157,000,000.00 The plaintiff has chosen not to challenge this figure.

Based on the circumstances of this case, the court finds that the plaintiff is entitled to an award of punitive damages in the amount of $500,000.00. This figure is roughly three times that awarded in *McGee*, but substantially less than the awards affirmed in *Wesson* and *Crenshaw*. The objectives of punishment and deterrence are served, and the plaintiff is amply rewarded for bringing a wrongdoer to account. The court is confident that this award will get the attention of Reserve Life and other insurance company officials.

Extracontractual Compensatory Damages

On direct examination, plaintiff stated that she suffered emotional distress as a result of the attempts by collection agencies to get her to pay her hospital bills. Plaintiff's credit rating was adversely impaired by Reserve Life's denial, and her employer viewed the telephone calls at work and her reduced production with disfavor.

The court is of the opinion that an award of $1,000.00 will adequately compensate the plaintiff for her emotional distress and foreseeable economic losses.

Attorney's Fees and Prejudgment Interest

Plaintiff does not specifically request attorney's fees or prejudgment interest. Assuming *arguendo* that the court is vested with the authority to award such damages in the absence of a request, the court in this instance declines to make an award of this type. The substantial assessment of punitive damages herein militates against reimbursing the plaintiff for costs incurred in bringing this action and the loss resulting from Reserve Life's delay in paying her liquidated claim. This will not be the rule in all bad faith cases, but the court here refuses to exercise its discretion since the parties have failed to specifically address the question.

Conclusion

To summarize, the court finds that Reserve Life acted without a legitimate or arguable reason when it denied plaintiff's claim and that such a denial amounted to gross negligence or reckless disregard for the rights of its insured. The plaintiff shall recover $500,000.00 in punitive damages and $1,000.00 in extracontractual compensatory damages for an overall total award of $501,000.00.

An order shall issue in conformity with this opinion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NO. EC85-415-LS-D

PATRICIA STEPENSON EICHENSEER
Plaintiff,

v.

RESERVE LIFE INSURANCE COMPANY,
Defendant.

ORDER DENYING MOTION TO RECONSIDER

This cause comes before the court on defendant's Motion to Reconsider, to Alter or to Amend Judgment. The court, being fully advised in the premises, finds said motion is not well taken and should be denied.

Accordingly, IT IS ORDERED:

That defendant's Motion to Reconsider, to Alter or to Amend Judgment is hereby denied.

This 20th day of May, 1988.

/s/ L. P. Senter, Jr.
CHIEF JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

NO. EC85-415-LS-D

PATRICIA STEPHENSON EICHENSEER,
Plaintiff,

v.

RESERVE LIFE INSURANCE COMPANY,
Defendant.

JUDGMENT

Pursuant to an opinion this day rendered, it is hereby ORDERED AND ADJUDGED:

That plaintiff, Patricia Stephenson Eichenseer, have and recover judgment against defendant Reserve Life Insurance Company in the sum of One Thousand Dollars ($1,000.00) compensatory damages and Five Hundred Thousand Dollars ($500,000.00) punitive damages, which sums shall bear interest at the rate of 6.59 percent per annum from the date hereof until paid.

Defendant is taxed with the costs of these proceedings.

This 18th day of March, 1988.

/s/ L. P. Senter, Jr.
CHIEF JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

88-4421

D.C. Docket No. CA-EC-85-415-LS-D

PATRICIA STEPHENSON EICHENSEER,
Plaintiff-Appellee,

versus

RESERVE LIFE INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

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(February 9, 1990)

Before RUBIN, POLITZ and JOHNSON, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 5, 1989, 5th Cir. 1989, 881 F.2d 1355)

JONES, Circuit Judge, dissenting from denial of rehearing en banc, joined by Gee, Jolly and Smith, Circuit Judges.

A panel of our court held that assuming *arguendo* the applicability of the Due Process Clause to awards of punitive damages, no violation of due process can be found on the facts of this case. By their lights, the defendant Reserve Life was "provided with adequate notice of the type of conduct which would subject it to significant pu-

nitive damages," and the district court's award was within Mississippi's "well-established guidelines for the imposition of punitive damages." The panel thus affirmed a $500,000 punitive damage award for Reserve's delay and belated payment of a $6,658.38 medical claim, amounting to a penalty 75 times the value of the claim.

Notwithstanding the decision of my brethren to the contrary, this case should be reheard en banc. Notwithstanding its demurrer on the due process issue, the rationale of the panel opinion sets no due process limit on awards of punitive damages for bad faith refusals to pay insurance claims governed by Mississippi law.[1] I am convinced that the panel's reasoning and result are fundamentally in error. Mississippi's bad faith refusal tort, a creature designed by the state supreme court, not the legislature, to punish and deter insurance companies when they fail to pay certain claims, mocks our notions of fundamental fairness embodied in the Due Process Clause of the fourteenth amendment. First, neither Reserve Life nor most of the dozens of other insurers who have been attacked by this new Mississippi tort have had adequate notice of the conduct that could result in punitive damage awards. Second, despite the panel's incantation of Mississippi's "well established standards," the fact finder possesses unbridled discretion to punish, and punishment is meted out among defendants in radically varying amounts.

Yet another factor counsels rehearing en banc. A majority of the Supreme Court have questioned the constitutional propriety of punitive damage awards run amok.[2]

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[1] **Eichensser v. Reserve Life Ins. Co.**, 881 F.2d 1355, 1363 (5th Cir. 1989).

[2] *See* **Browning-Ferrris Indus. v. Kelco Disposal, Inc.**, 109 S. Ct. 2909, 2923, 106 L. Ed. 2d 219, 241 (1989) (Brennan, J., concurring) (Justice Brennan, joined by Justice Marshall, indicated that due process clause may limit punitive damage awards that are based on "skeletal guidance"); *id.* at 2924, 106 L. Ed. 2d at 242-43 (O'Connor, J., con-

As lower court judges, we should debate this issue for the benefit of the higher Court and the public.[3]

Lacking the opportunity for that debate, but in hope of spurring it on, I shall shadow-box the panel opinion.

I. Mississippi Law

Commencing with **Standard Life Ins. Co. v. Veal,** 354 So. 2d 239, 248 (Miss. 1977) the Mississippi Supreme Court entered the vanguard of state courts that began to create torts from what were previously breach of contract actions against insurance companies for failure to pay a claim. The state supreme court has articulated the basis for imposing punitive damages as a two-step process: first, was there a legitimate and arguable reason for the insurance company to deny coverage; second, if no such reason appears, was the denial motivated by malice or recklessness. **Eichenseer,** 881 F.2d at 1360. If the jury finds the requisite state of mind, they are entitled to award punitive damages based upon multiple factors:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future;
>
> (2) such amount as is reasonably necessary to make an example of the defendant so that others

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curring in part and dissenting in part) (joined by Justice Stevens); **Bankers Life & Cas. Co. v. Crenshaw,** 468 U.S. 71, 86-89, 108 S. Ct. 1645, 1654-56, 100 L. Ed. 2d 62, 77-79 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (Justice O'Connor, joined by Justice Scalia, stated that unlimited jury discretion in awarding punitive damages may violate the due process clause).

[3] "[W]e ought not leave this lion in the busy street of our trial courts and inevitably multiply the appellate workload." **Brock v. Merrell Dow Pharmaceuticals, Inc.,** 884 F.2d 167, 170 (5th Cir. 1989) (Higginbotham, J., dissenting from denial of rehearing en banc).

may be deterred from the commission of similar offenses; and

(3) the pecuniary ability or financial worth of the defendant.

Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254, 278 (Miss. 1985) (citations omitted). It has been correctly observed that the standards for insurance practice effectively mandated by the Mississippi Supreme Court are evolving on a case-by-case basis. **Eichenseer v. Reserve Life Ins. Co.,** 682 F. Supp. 1355, 1366 (N.D. Miss. 1988).

The long march of the Mississippi Supreme Court toward "equitable" insurance claim handling practices is not without significance for this case. Surprisingly, however, this sequence of decisions is completely overlooked by our court's opinion. Prior to the handling of Eichenseer's claim, *no* Mississippi case had held that either failure to obtain "all relevant medical records" or egregious delay in processing a claim could fall within the purview of a bad faith refusal tort. The Mississippi cases before 1983 dealt with entirely different fact patterns: **Veal,** 354 So. 2d at 247-48 (punitive damages for insurance company's failure to honor credit insurance claim clearly within terms of policy); **Travelers Indemnity Co. v. Wetherbee,** 368 So. 2d 829, 834-35 (Miss. 1979) (payment withheld on homeowners' policy in violation of its terms after arson investigation had terminated favorably for insureds); **Reserve Life Ins. v. McGee,** 444 So. 2d 803, 805-06, 811 (Miss. 1983) (post-claims underwriting, i.e. rescission of a medical policy, after insured made a covered claim, for a material misstatement of facts in the policy application when the insured provided sufficient information about past medical treatment that the company could have investigated before issuance of a policy). *See also* **Richards v. Allstate Ins. Co.,** 693 F.2d 502 (5th Cir. 1982) (company misled automobile policyholders to believe there was an exclusion to policy coverage, even though Mississippi law did not recognize such

exclusion); Freeland & Freeland, Bad Faith Litigation: A Practical Analysis, 53 Miss. L. J. 237, 276 (1983) ("The lack of clarity in the case law has made it exceedingly difficult for either plaintiffs or defendants to evaluate the merits of a bad faith claim.").

Not until after Eichenseer's claim was denied by Reserve did the Mississippi Supreme Court begin to "punitize" in certain cases an insurer's failure to obtain "all relevant medical records", **Crenshaw,** 483 So. 2d at 270, 272; and its failure to consult with a medical expert prior to denying a claim, **Life Ins. Co. v. Allen,** 518 So. 2d 1189, 1193 (Miss. 1987). Even then, the court's pronouncements have not been uniform. In **Blue Cross & Blue Shield v. Campbell,** 466 So. 2d 833, 840-41 (Miss. 1984), predating **Crenshaw,** the court found as a matter of law that an insurance company could rely on ambiguous hospital records alone in denying a claim based on a preexisting condition clause of the policy. Later Mississippi cases have continued to elaborate, ex post facto, upon acceptable claims handling policies.[4] Indeed, but for the rulings that already exist regarding the bad faith refusal tort, Mississippi's Supreme Court has eschewed a definition of actionable conduct in favor of mere description of the justices' goal:

> We are of the opinion the term "legitimate or arguable reason," although spawning much com-

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[4] **National Life and Accident Ins. Co. v. Miller,** 484 So. 2d 329, 337 (Miss. 1985) (failed to interview agents and supervisor until two weeks before trial); **Southern United Life Ins. Co. v. Caves,** 481 So. 2d 764, 768 (Miss. 1985) ("even after the claim arose, Southern made no attempt to contact its agent to determine what imputable knowledge she had."); **Blue Cross & Blue Shield v. Maas,** 516 So. 2d 495, 496-97 (Miss. 1987) (insurer inadequately handled and investigated claim after insured filed lawsuit); **Mutual Life Ins. Co. v. Wesson,** 517 So. 2d 521, 526-27 (Miss. 1987) (insurer denied claim without properly reviewing policy and application, but relied solely on inaccurate computer generated data); **Allen,** 518 So. 2d at 1193 (claims adjuster failed to consult physician before denying claim).

> ment in our cases and in briefs and arguments of counsel, is nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to the heightened level of an independent tort. Additionally, the very term expresses the holding of this Court establishing a distinction between ordinary torts, the product of forgetfulness, oversight, or the like; and heightened torts, which are the product of gross, callous or wanton conduct, or, if intentional, are accompanied by fraud or deceit.

State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985) (citation omitted). This non-rule of law may be likened to the legislative preamble of a statute: while it expresses the legislature's intent, it does not define the conduct to be regulated, as do the substantive provisions of an enactment. Yet, the Mississippi Supreme Court has repeatedly authorized punishment for failure to abide by its intentions.

Mississippi courts all but refuse to interfere with the amounts of punitive damages assessed by the fact finder. As the majority opinion put it in **Bankers Life v. Crenshaw,** an award equal to less than 1% of the company's net worth does not shock the judicial conscience. *See* **Bankers Life & Cas. Co.,** 483 So. 2d at 277-79.

II. Mississippi Law Applied to this Case.

Reserve Life took three and a half years to pay Eichenseer's claim for medical expenses incurred from her hysterectomy. The company at all times based its denial of the claim on a pre-existing condition exclusion. This was supported by a statement of Eichenseer's treating physician in the hospital admitting records, that the patient's "pain ha[d] been present in the lower abdomen in period for the last 2-3 years." The same doctor's discharge summary, however, diagnosed acute pelvic inflammatory

disease—a condition that would have had to arise suddenly—as well as pre-existing inflammation, cysts and endometriosis. The company's adjuster did not consult with medical experts before denying the claim. Moreover, the company fumbled and mismanaged its claims handling throughout Eichenseer's attempts to seek a non-judicial adjustment. After she filed suit, the company decided to pay her $6,000 plus claim, although it later produced expert testimony corroborating its evaluation that she underwent surgery for a pre-existing condition.

The trial court, having analyzed Mississippi bad faith refusal law in detail, found this case governed by the rule that a company must make a reasonable effort to obtain "all available medical information." 682 F. Supp. at 1366. The court recognized that this rule derived from two cases decided after Eichenseer's claim was handled. *See* **Allen,** 518 So. 2d at 1193; **Crenshaw,** 483 So. 2d at 270, 272.[5] Our panel, on appeal, likewise relied on these two cases to establish the "clear requirement in Mississippi law" which Reserve, two years before the "clear requirement" was expressed by the Mississippi Supreme Court, violated.[6]

Justifying the sum of $500,000 in punitive damages, the trial court tried to enforce Mississippi's "standards" for their assessment. In addition to citing the goals enunciated by **Crenshaw,** *supra*, the court considered "the degree of the offense, the presence or absence of malice, the motive

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[5] Elsewhere, the trial court's opinion found these two cases "most analogous" to the one at bar. 682 F. Supp. 1371, 1372.

[6] "Based on the law of these cases, Reserve Life should have known that its conduct in processing the claim of Eichenseer in such a reckless and grossly negligent manner would lead to the imposition of a significant punitive damage award. In particular, we note once again the well-established requirement in Mississippi law that an insured [sic] make reasonable efforts in obtaining all relevant medical information regarding the claim of an insured for health benefits." 881 F. 2d at 1365-66.

behind the actions, the injury intended, and the public sense of justice and propriety." *See* 881 F.2d at 1366 (citing **Mutual Life Ins. v. Estate of Wesson,** 517 So. 2d 512, 532 (Miss. 1987), *cert. denied,* ___ U.S. ___, 108 S. Ct. 2035 (1988)). The court characterized Reserve's failure to pay Eichenseer's claim promptly as "egregious". The court also found that Reserve had once before suffered a Mississippi punitive damage award, which, according to the court, "did not get the attention of Reserve Life and had little, if any, deterrent effect." 682 F. Supp. at 1373. To its apparent discredit in the court's eyes, Reserve did not tender interest when it finally paid Eichenseer's claim and "expressed regret at trial" for its decision to pay. Although declining to find malice, the court decided that Reserve was motivated by an intent "to save money by denying a claim." *Id.* The amount of the award was deliberately set higher than Reserve's earlier ($158,000) punitive damage award, but less than the amounts approved in two other Mississippi cases. *See* **Mutual Life Ins. v. Estate of Wesson,** 517 So. 2d at 533 (court ordered remittitur of $6.5 million on punitive award of $8 million); **Crenshaw,** 483 So. 2d at 277 ($1.6 million punitive award). The court found Reserve's net worth to be $157 million, but it expressed confidence that "this award will get the attention of Reserve Life and other insurance company officials." 682 F. Supp. at 1373.

III. Due Process

"[N]or shall any state deprive any person of life, liberty or property without due process of law."

U.S. Constitution, Amendment XIV.

The Due Process Clause has long and consistently been held to bar legislation that is unduly vague, i.e. that does not give fair notice of the conduct it proscribes or that entrusts enforcement to the unguided discretion of pros-

ecutors or juries. Fundamental fairness, which characterizes due process, has been held to set up a calculus for determining whether a particular deprivation, e.g., of Reserve's property through a punitive damage award, is attended by sufficient safeguards of accuracy to realize the goals of public policy. **Matthews v. Eldridge,** 424 U.S. 319, 332, 335, 96 S. Ct. 893, 901, 903 (1976); **Wheeler,** The Constitutional Case For Reforming Punitive Damage Procedures, 69 Virginia L. Rev. 269, 277 (1983). Finally, the Supreme Court has reviewed awards of punitive damages rendered pursuant to legislative enactments to determine whether they were "grossly excessive" or "so severe and oppressive as to be wholly disproportioned to the offense. . . ."[7] As Justice Brennan remarked, **surely** non-legislative punitive damage awards, which represent the *ad hoc* judgment of a jury, should be subject to more exacting scrutiny than this. **Browning-Ferris,** 109 S. Ct. at 2923, 106 L. Ed. 2d at 241-42 (Brennan, J., concurring). In my view, Mississippi's bad faith refusal tort transgresses these limits.

A. *Vagueness*

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [footnote

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[7] **St. Louis, I.M. & S. Ry. Co. v. Williams,** 251 U.S. 63, 40 S. Ct. 71, 73 (1919); *see also* **Southwestern Telegraph & Tele. Co. v. Danaher**, 238 U.S. 482, 35 S. Ct. 886, 888 (1915); **Waters & Pierce Oil Co. v. Texas,** 212 U.S. 86, 29 S. Ct. 220, 227 (1909); **Missouri Pacific Ry. Co. v. Humes,** 115 U.S. 512, 522-23 (1885).

> omitted] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [footnote omitted] A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [footnote omitted]

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294, 2298-99 (1972).

Grayned thus summarized a principle that was recognized over 100 years ago by the Supreme Court. *See* **United States v. Reese**, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.")[*] In **Giaccio v. State of Pennsylvania**, 382 U.S. 399, 402, 86 S. Ct. 518, 520-21 (1966), the Court specifically held that a state act "whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." *See also* **Cline v. Frink Dairy**, 274 U.S. 445, 463, 47 S. Ct. 681, 687 (1927). **Giaccio** summarized this doctrine well:

> "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and ju-

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[*] For similar expressions of the doctrine of vagueness, *see, e.g.*, **United States v. National Dairy Prod. Corp.**, 372 U.S. 29, 32-33, 83 S. Ct. 594, 598 (1963); **Papachristou v. City of Jacksonville**, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839, 843 (1972); **Lanzetta v. New Jersey**, 306 U.S. 451, 453, 59 S. Ct. 618, 619 (1939) ("All are entitled to be informed as to what the State commands or forbids"); **International Harvester v. Kentucky**, 234 U.S. 216, 223, 34 S. Ct. 853, 855 (1914).

> rors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

Giaccio, 392 U.S. at 402-03, 86 S. Ct. at 520-21 (citations omitted).[9]

It is also true, however, that the degree of scrutiny required by the vagueness doctrine may vary with the relative severity of the penalty imposed. **Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,** 455 U.S. 489, 498-99, 71 L. Ed. 2d 362, 102 S. Ct. 1185, 1193 (1982).

We are confronted, as usual in matters of constitutional law, with a question of degree. The panel opinion held that Reserve Life had adequate notice from Mississippi law that its wrongful denial of an insurance claim could lead to the imposition of punitive damages. I disagree, because this equation fails to take into account the punitive nature of punitive damages. Punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." **Gertz v. Robert Welch, Inc.,** 418 U.S. 323, 350, 41 L. Ed. 2d 789, 94 S. Ct. 2997, 3012 (1974). In Mississippi bad faith refusal law, their objectives are punishment of the wrongdoer; deter-

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[9] The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." **Connally v. General Constr. Co.,** 269 U.S. 385, 391, 46 S. Ct. 16, 127, 70 L. Ed. 322 (1926) (citations omitted). "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review." **Roberts v. United States Jaycees,** 468 U.S. 609, 629, 82 L. Ed. 2d 462, 104 S. Ct. 3244, 3256 (1984) (citations omitted).

rence of the wrongdoer and others from engaging in similar conduct; and rewarding the injured party for bringing suit. *See* **Eichenseer,** 682 F. Supp. at 1372; **Crenshaw,** 483 So. 2d at 278. Punishment may not, according to the vagueness doctrine, be inflicted arbitrarily and capriciously. The goal of punishment critically distinguishes punitive damages from other common law remedies which are solely compensatory, and it requires a stricter vagueness analysis.

In my view, vagueness inheres both in Mississippi's standards for inflicting liability and for measuring the amount of the punitive award. As to the standard for imposing liability, Mississippi bad faith refusal law is a predator lurking in the shadows to pounce on the unsuspecting. Consider this case. Our court's panel held that Reserve clearly had adequate notice that its failure to consult "all relevant medical records" and obtain expert advice before denying Eichenseer's claim, coupled with its delay in adjustment, could subject it to punishment. With all due respect, as was demonstrated in the foregoing section on Mississippi law, that is not correct. In December 1983, after Reserve had denied Eichenseer's claim, the Mississippi Supreme Court observed: "As is often the case, the court is required to apply applicable legal principles to the particular facts of a particular case. As usual, those facts are different from any other case previously considered." **Reserve Life Ins. Co. v. McGee,** 444 So. 2d at 803. The supreme irony in the punishment of Reserve here is that the courts acknowledged it ultimately had an "arguable reason" to deny Eichenseer's claim. 881 F.2d at 1361.

Had there been evidence that Reserve's actions were infected by spite or ill will, this might well be a different case.[10] But the court here found no malice and punished

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[10] Punitive damages are a venerable legal consequence of particularly

nevertheless. It is not fundamentally fair to regulate insurance claims handling by punishing, retrospectively, conduct that was not motivated by subjective ill will.[11] As the Supreme Court put it,

> [c]ertainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

Giaccio, 382 U.S. at 403, 86 S. Ct. at 521.

The vagueness doctrine imposes another hurdle upon Mississippi's bad faith refusal law even more significant than the patent lack of foreknown standards for punishing insurers. The Supreme Court has recognized "that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal

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reprehensible behavior. **Day v. Woodworth**, 54 U.S. 363, 371 (1851). *See also* **Jeffries**, A Comment On The Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986). To the extent they are imposed for intentional misconduct or malice, I have no quarrel with their constitutionality. We are not here concerned with the vexing problem of multiple punitive damage awards for one tort. *See, e.g.*, **Roginsky v. Richardson-Merrell, Inc.**, 378 F.2d 832, 839-841 (2d Cir. 1967) (per Friendly, J.) But Mississippi's seminal cases have not relied on malice. The court has instead inferred a "heightened tort" from "gross negligence or reckless disregard for the rights of others." **Aetna Casualty & Surety Co. v. Day**, 487 So. 2d 830, 832 (Miss. 1986). The line between negligence and gross negligence, especially in breaches of contract, is all too murky.

[11] Of course, as Mississippi case law evolves, explanations of "bad faith refusal" will furnish sufficient guidance to put insurers on notice, following those decisions, of what they must do. But no insurer should have to predict, in advance of such case law, what actions may subject it to punishment.

guidelines to government law enforcement.' " **Kolender v. Lawson,** 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983) (quoting **Smith v. Goguen,** 415 U.S. 566, 574, 94 S. Ct. 1242, 1247-48 (1974)). Our court held that in Mississippi, the fact finder is allegedly guided by certain standards in setting awards of punitive damages. Included among these are the goals of punishment and deterrence; the pecuniary ability or financial worth of the wrongdoer; the degree of the offense; the presence or absence of malice; and the public sense of justice and propriety. *See* **Eichenseer,** 881 F.2d at 1366; **Bankers Life & Casualty Co.,** 483 So. 2d at 278 (citations omitted). To determine whether the "standards" make any sense in practice, we need only review the range of punitive damages that have been awarded under Mississippi's bad faith refusal law. *See, e.g.,* **Independent Life & Accident Ins. Co. v. Peavy,** 528 So. 2d 1112, 1120 (Miss. 1988) (punitive damage award of $250,000, "vastly larger than the actual damages" of $412.20); **Life Ins. Co. of Miss. v. Allen,** 518 So. 2d 1189, 1194 (Miss. 1987) ($20,000 punitive damage award); **National Life and Accident Ins. Co. v. Miller,** 484 So. 2d 329, 338 (Miss. 1985) ($350,000 punitive damage award, actual damages of $2,500); **Bankers Life & Cas. Co. v. Crenshaw,** 483 So. 2d at 277-279 (Miss. 1985) ($1.6 million punitive damage award, actual damage award of $20,000); **Standard Life Ins. Co. of Indiana v. Veal,** 354 So. 2d 239 (Miss. 1978) ($25,000 punitive damage award; $1,008 actual damages). This is not monopoly money, but a nearly hundred fold variation in the range of punishments assessed. Punishment there is as a result of this law, but it is punishment without moorings. As a result, "the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." **Giaccio,** 382 U.S. at 403-04, 86 S. Ct. at 521.

Giaccio furnishes a close analogy to the standardless discretion entrusted to the factfinder in Mississippi's cases. The statute there at issue allowed a criminal jury to award

costs against the defendant, even if he was acquitted. Not only did the statute afford no standard upon which to assess costs, but the Supreme Court found no guidance in state court decisions that awarded costs for conduct which, though not unlawful, was nevertheless characterized as "reprehensible in some respect," "improper," outrageous to "morality and justice," or "misconduct of some kind as a result of which [the defendant] should be required to pay some penalty short of conviction . . . ." *Id.* Likewise, the rubrics of punishment, deterrence and the other criteria set forth in Mississippi, while descriptive, are simply too uncertain to yield consistent results.

The arbitrariness of the awards issued by juries is not, in Mississippi's system, subject to meaningful judicial review. The state supreme court counselled that "as the jury are the sole judges of the amount which ought properly to be assessed in order to inflict adequate punishment, the courts should scrupulously avoid any undue interference with their prerogative. . . ." **Reserve Life Ins. Co. v. McGee,** 444 So. 2d at 812 (quoting earlier cases). As was noted, the state supreme court later concluded that any punitive award less than one-half of one percent of a company's net worth will not "shock the judicial conscience." The judicial hands-off policy on punitive damages assures that no unifying principle can or will emerge from the penalties inflicted upon insurance companies.

B. The Process That is Due

It may be objected that if punitive damages awarded pursuant to Mississippi's bad faith refusal tort are held to violate due process, the federal courts will be asked to invade additional areas of state common law adjudication. Additionally, it is feared, federal courts will be tempted to assume state adjudicatory roles in passing upon alternatives to punitive damages. I believe these arguments mischaracterize the source of judicial activism and hide

under what is in this case a false flag of federalism in counseling federal judicial restraint.

It is Mississippi's Supreme Court, not its legislature, which has undertaken to revise insurers' claims handling practice by means of retrospective punishment. One justice clearly expressed his intentions to this effect: "Again, a court has been called upon to redress grievances which could be avoided by proper state regulation of insurance company practices." **National Life and Accident Ins. Co. v. Miller,** 484 So. 2d 329, 339 (Miss. 1985) (Hawkins, J., concurring). In our system, the notion of "judicial law-making" should be oxymoronic, but it is not. The constitutional requirement that clarity and ascertainable standards must guide legal punishment may not be waived simply because the challenged law originated in courts rather than a legislature. This case is different because it involves judge-made law, but it is not immune to constitutional analysis. Thus, if a statute declared as an offense the refusal to pay an insurance claim without an arguable or reasonable basis, which refusal was attended by gross negligence or recklessness, and if the statute then punished this offense with fines ranging from zero to millions of dollars at the sole discretion of the factfinder, I think we would not hesitate to strike it down for vagueness. *Compare* **Giaccio,** *supra.* Judicial activism by the state courts, not the federal court, creates the constitutional dilemma. Consequently, the federal court would not overstep its bounds to declare that in *this* case, the $500,000 punitive damage award is unconstitutional because it violates the prior notice requirement of due process and results from excessive discretion in the hands of the factfinder.

The remedy for Mississippi's unconstitutional means of inflicting punitive damages is as straightforward as the constitutional analysis itself. That remedy need not be prescribed by the federal court not should it significantly interfere with the right of Mississippians to be governed by

their judges. Rudimentary modifications of the Mississippi law assessing punitive damages would cure the problems of notice and undue discretion without abandoning that remedy. For instance, the state court could declare that "new rules" of bad faith refusal would have prospective effect only. *See, e.g.*, **Kelsay v. Motorola, Inc.**, 74 Ill. 2d 172, 384 N.E.2d 353, 360-61 (1978); **Nees v. Hocks**, 272 Or. 210, 536 P.2d 512, 517 (1975) (en banc). The court could pursue a compensatory principle by allowing a prevailing plaintiff in a bad faith refusal case to recover his attorneys' fees. The court could require that punitive damages be proportional to the actual damages in the lawsuit, with some adjustment made for particularly small amounts of damage. *See, e.g.*, **Maxey v. Freightliner Corp.**, 665 F.2d 1367, 1377-78 (5th Cir. 1982) (en banc) (extolling Texas' rule which then required proportionality) (per Johnson, J.); **Stambaugh v. International Harvester**, 106 Ill. App. 3d 1, 435 N.E.2d 729 (1982) (rev'd on other grounds); **Galindo v. Western States Collection Co.**, 82 N.M. 149, 477 P.2d 325, 331 (1970); **Montgomery v. Tufford**, 437 P.2d 36, 40 (Colo. 1968). Any or all of these measures would minimize the temptation by juries to play Robin Hood, would introduce consistency in the amount of punishment inflicted, and would balance the need for ascertainable standards with a disincentive to engage in "bad faith" denial of claims. Similar remedies exist in many states and have been enacted by numerous legislatures. *See, e.g.*, Ark. Stat. Ann. § 66-3238; La. Rev. Stat. Ann. § 22:658 (West Supp. 1989); Tenn. Code Ann. § 56-3-105. Federal courts would not have to re-write Mississippi's bad faith refusal law in order to insist that it comply with due process.

IV. CONCLUSION

One of the most unseemly features of our current legal system is its tendency to promote litigation as high-stakes gambling. A winner can gain the keys to the corporate

treasury, if he has the good fortune to obtain the right lawyer, the right jury and the right forum. Punitive damages are a key feature of the abuse of the litigation process. If, as in Mississippi's bad faith refusal law, there are no clear standards to permit their avoidance by a defendant or to bring to heel the amounts awarded by a jury, this is no more tolerable than Pennsylvania's statute that allowed an *acquitted* defendant to be saddled with the costs of his own prosecution. *See* **Giaccio** *supra*. At least in that case, the costs of prosecution were limited. In the present case, they clearly are not. I dissent from the denial of rehearing *en banc*.

APPENDIX G

[89]

* * *

Q Doctor, was the history which Mrs. Eichenseer gave you that you recorded in the hospital record correct?

A To my knowledge, it was.

Q Yes, sir. And if someone give you a piece of paper to sign to say it was incorrect; do you recall their doing that?

[90] A No, sir, I don't remember.

Q And if you signed an affidavit before a Justice of the Peace saying that two or three years wasn't right, two or three days was what was intended, do you have any recollection of doing anything like that?

A. No, sir.

* * *

APPENDIX H

[172]

* * *

Q Do you have a system at Reserve Life whereby you could verify what letters and documents are received by mail?

A Yes, we do.

Q What is that system and explain it to the Court, please, sir?

A That's called our signature service system. And when we receive correspondence from attorneys, complaint letters, those letters, that correspondence goes directly from the mailroom to what we call our signature service system. They are logged in, they are put on a computer listing, and at that point in time the correspondence then is—we try to match that correspondence with the file after it has been logged in the [173] file.

* * *

[180]

* * *

A "You indicate in your letter that both your client and Dr. Murphree examined the hospital record and found no reference to gynecological problems. However, attached you will find a copy of the entire medical record upon which our decision was based. As you can see in the body of record entitled Present Illness the notation that indicates "the pain has been present in the lower abdomen in periods for the last two to three years."

Q Was the basis of the denial as stated in the June 21, 1984 letter to Mr. Kesler any different than the basis of denial the three previous times, on June 3, October 25 and December 13, 1983?

A No. It was basically the same.

Q P-9 is a July 10, 1984 letter to Mr. Kesler. I don't think you have that in front of you. You do. You have it.

Based on your review of the file and your personal knowledge, why would that letter have been written?

A We had not received a reply from Mr. Kesler and wrote to Mr. Kesler trying to resolve the situation.

Q All right, sir. I think it's stipulated that the claim file did not contain Mr. Kesler's June 23 letter with enclosure of Dr. Murphree's June 17 affidavit. Mr. Jenkins, let me ask you if you personally reviewed the signature service to [181] determine whether or not that letter was routed to the signature service and logged onto the signature service?

A Yes, I did. And there was no indication that it had been received.

* * *

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No. 89-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1303

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSER,
Respondent.

STATEMENT OF THE CASE

This is a case where the Petitioner refused to pay medical expenses incurred as a result of Pelvic Inflammatory Disease that necessitated a hysterectomy. By definition, this condition is sudden in onset. Without consulting the attending physician, or securing all the medical records, or consulting a physician of Petitioner's choice, the claim was repeatedly denied on the basis that there was a pre-existing condition.

After a bench trial, the Trial Judge found the Petitioner had violated its implied covenant of good faith dealing as a result of its repeated claim denial without an arguable basis. Punitive damages of $500,000.00 were awarded. On appeal, after de novo consideration, the Fifth Circuit panel unanimously affirmed. Both en banc and panel re-hearing motions were denied.

THE ARGUMENT
REASONS NOT TO GRANT THE WRIT

A. This is not an appropriate case to consider constitutional questions concerning Mississippi's substantive law of punitive damages.

The facts and circumstances of this case make it an inappropriate case for this Court to entertain constitutional arguments questioning Mississippi's substantive law concerning punitive damages. The facts of this case were determined by the District Court after a bench trial. The District Court carefully deliberated the facts and the resulting judgment. (The District Court opinion is Appendix C to the Petition for Writ of Certiorari.) Finding that Reserve Life had litigated tortious breach of insurance contract issues in Mississippi in the case of *Reserve Life Insurance Company v. McGee*, 444 So.2d 803 (Miss. 1983), the Court of Appeals concluded that such involvement, taken with other relevant facts, precluded a finding of a violation of due process. App. A, p. 23a. *Reserve Life Insurance Company v. McGee*, supra, was announced in 1983, the same year in which the conduct of Reserve giving rise to Eichenser's case of action commenced.

The reasoning of the Court of Appeals is sound. Reserve's prior involvement in a breach of insurance contract case in Mississippi was direct notice of the nature of the independent tort recognized by Mississippi law, and direct notice of the probability of enhanced damages in the event of a repeat offense.

The Mississippi Supreme Court announced the existence of the cause of action for an independent tort committed in the course of a breach of insurance

contract eight years prior to the start of Reserve's egregious conduct toward Eichenser in *Progressive Casualty Insurance Company vs. Keys*, 317 So.2d 396 (1975). Two years later, that Court affirmed a substantial award of punitive damages in *Standard Life Insurance Company v. Veal*, 354 So.2d 239 (Miss. 1977). As discussed below, it can hardly be said that Reserve was without notice and caught unaware of the nature and seriousness of its actions and failure to act in this case. Even if one could believe that Reserve was unaware of Mississippi law in this respect prior to the lawsuit filed by McGee, it was certainly well educated as a result of that litigation.

This is a particularly inappropriate case in which to consider the due process arguments of Reserve with respect to the issue involving notice of prohibited conduct. This case involves specific, narrow issues of tortious breach of insurance contracts. It does not involve elements of fraud or the various intentional torts or civil rights violations for which punitive damages have traditionally been awarded. This case lacks appropriate parties, subject matter and factual basis for this Court to fashion any rule determining in what manner the Due Process Clause checks the award of punitive damages in any given case.

There are no facts to support the argument of Reserve that it was exposed to a retrospectively applied standard of conduct. The arguments of Reserve are primarily based upon the Mississippi Supreme Court's decision in *Bankers Life and Casualty v. Crenshaw*, 483 So.2d 254 (Miss. 1985), which was decided within a few weeks prior to this litigation being filed. It is the contention of Reserve that this case imposed new, enhanced duties to investigate claims on insurance

companies. This contention is erroneous because the Mississippi Supreme Court simply explained that a minimal investigation into a health insurance claim would include obtaining all relevant medical records and interviews of the treating physician. The case does not depart from the initial rule found in the seminal cases cited above. The decision states that Banker's Life knew what a minimal investigation included, but failed to conduct such an investigation. However, even if one could believe that Reserve stood ignorant of how to conduct a minimal investigation prior to the *Bankers Life* decision in 1985, the company was certainly aware of what constituted adequate investigation after the fact. Nevertheless, Reserve waited two more years, until shortly before trial, to conduct any further investigation into Eichenser's claim, and then only to secure expert testimony for the trial.

Yet another facet of this case which renders it inappropriate for this Court's review is that the arguments advanced by Reserve, and other insurance companies, are largely directed at huge verdicts returned by juries, rather than judges acting as triers-of-fact. Juries, Reserve argues, are the villains "playing Robin Hood" by returning multi-million dollar verdicts. In this case, however, the judgment was returned by the District Court sitting without a jury, only after careful consideration of the record. The District Court was certainly not arbitrary nor capricious in reaching its decision, taking almost seven months to deliberate this case. It is outrageous to suggest or even imply that Judge Senter played "Robin Hood" in this case.

Finally, the amount of the award in this case is rather modest in comparison to the punitive damage awards cited by Reserve in the Petition for Writ of Certiorari. It certainly appears that various defendants identified by Reserve will probably ask this Court to consider in what manner the Due Process Clause checks punitive damages in cases with proper factual foundations and awards in such huge amounts as to demonstrate a crippling effect on an individual defendant.

Furthermore, the award of $500,000.00 is this case amounts to less than one-third of one percent (0.333%) of Reserve's admitted net worth of approximately $157,000,000.00. Payment of the award in this case can pose no long term hardship on Reserve; yet it will not soon be forgotten as was the case of *Reserve Life Insurance Company v. McGee*, supra. Deterrence, one of the primary objectives of the District Court in making this award, will be accomplished and justice will be served. This fact diminishes Reserve's arguments that this case is of such import as to necessitate review by this Court on the constitutional or any other grounds.

B. Mississippi's substantive law affords due process protection to insurance companies.

It must be recognized that insurance companies have an affirmative duty to be cognizant of the law of the states in which they sell coverage. *Richards v. Allstate Insurance Company*, 693 F.2d 502, at 505 (5th Cir. 1982). It has already been noted that Mississippi's Supreme Court recognized a cause of action for tortious breach of an insurance policy in 1975. *Progressive Casualty Insurance Company v. Keys*, 317 So.2d 396 (Miss. 1975). That court applied the prin-

ciple in *Standard Life Insurance Company v. Veal*, 354 So.2d 239 (Miss. 1977), stating that the company arbitrarily denied a legitimate claim of $1,008.00 for no reason whatever, wholly without any legitimate or arguable reason therefor. That court further found that a $25,000.00 punitive damage award, considered in light of the assets of the defendant insurance company in excess of $85,000,000.00, was necessary to deter the arbitrary action of the company. Thus, insurance companies were thereafter on notice that the failure to pay claims, absent some legitimate or even arguable reason would constitute an independent tort for which substantial awards of punitive damages would be appropriate. In order for an insurance company to have a legitimate or arguable reason, simple logic dictates that the insurance company evaluate and investigate a claim before denial.

It is important to note that the Mississippi Supreme Court characterized the conduct of Standard Life as an arbitrary act. Thus, insurance companies, including Reserve Life, were on notice in 1977 that claims must not be rejected in an arbitrary manner. "Arbitrary" is defined in Black's Law Dictionary 4th Ed. Rev. (1976) as follows:

> . . .as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment. . . [citations omitted]

It is clear that Mississippi's substantive law rule on tortious breach of insurance contracts was stated with sufficient precision to meet due process requirements as early as 1977.

Subsequent decisions of the Mississippi Supreme Court equate arbitrary handling of insurance claims with intentional wrong, gross negligence, and reckless disregard for the rights of the insured. See: *Weems v. American Security Insurance Company*, 486 So.2d 1222 (Miss. 1986). There is precedent from this Court contrary to the position of Reserve. In finding punitive damages allowable in civil rights cases, this Court state in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983):

> . . .deterrence, he contends, cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law and to avoid the proposed sanction. Recklessness or callous indifference, he argues, is too uncertain a standard to achieve deterrence rationally and fairly. A prison guard, for example, can be expected to know whether he is acting with actual ill will or intent to injure, but not whether he is being reckless or callously indifferent. Smith's argument, if valid, would apply to ordinary tort cases as easily as to § 1983 suits. . .In any event, the argument is unpersuasive. . .103 S.Ct, at 1636, 1637.

For guidelines in determining the amount to be inflicted in punitive damage suits against insurance companies, the Mississippi Supreme Court looked to traditional Mississippi substantive law rules concerning such punitive damages. *Standard Life Insurance Company v. Veal*, supra, citing *Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972), and *Yazoo & Mississippi Valley Railroad v. W[illegible]* 57 Miss. 344, 39 So.

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489 (1905). Although Mississippi law highly respects the jury's mature discretion in setting punitive damages, *Snowden v. Osborne*, supra, there are due process satisfying limits as to the amount of punitive damages juries or fact-finders are allowed to inflict. Mississippi law has never contemplated allowing juries unfettered discretion in awarding punitive damages. *Gulf M. & O. R. Co. v. Hawthorne*, 225 Miss. 1, 82 So.2d 454 (1955), states that a jury must not be set "loose without a bridle" in the area of punitive damages. Arbitrary and unreasonable amounts are forbidden. *Commodore Corporation v. Bailey*, 393 So.2d 467 (Miss. 1981). The amount should punish a defendant, but is not allowed to financially destroy a defendant. *T.C.L., Inc. v. Lacoste*, 431 So.2d 918 (Miss. 1983). Thus, proof of the financial condition of the defendant is a prerequisite of any punitive damage award so as to provide the necessary yardstick as to amount. *First American Bank of Iuka v. Mitchell*, 359 So.2d 1376 (Miss. 1978). The Court of Appeals noted that the factors to be followed in determining the amount is summarized in *Bankers Life and Casualty v. Crenshaw*, supra, at 278, as:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future;
>
> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses; and
>
> (3) The pecuniary ability or financial worth of the defendant.

Furthermore, Mississippi law requires its judges to make very restrictive decisions of fact and law prior to allowing a jury to consider punitive damages against an insurance company. *Blue Cross and Blue Shield v. Campbell*, 466 So.2d 833 (Miss. 1984). Such decisions are reviewed by appellate courts de novo. *Reserve Life Insurance Company v. McGee*, supra. Section 11-1-55, Mississippi Code of 1972, grants Mississippi's courts the power to make remittitur of excessive punitive damage awards.

Mississippi's substantive law concerning punitive damages as applied to insurance companies meets constitutional due process requirements.

C. Mississippi's substantive law on tortious breach of insurance contracts does not violate the Contract Clause.

Reserve erroneously urges that this Court should consider "retrospectively applied standards of conduct". As demonstrated above, the Mississippi Supreme Court clearly articulated the relevant standards of conduct in 1977 with its decision in *Standard Life Insurance Company v. Veal*, supra. There have been no enhanced standards of conduct espoused by the Mississippi Supreme Court. Subsequent decisions from that court simply apply the rules in the infinite factual situations that can arise in litigation of this type. It could be argued that if any revisions to the seminal rule in Mississippi have occurred, the revisions have made the possibility of punitive damage awards against insurance companies for tortious breach of contract more remote. In any event, Reserve is attempting to disguise what is in reality an ex post facto challenge to Mississippi's judically created law as a due process challenge. The challenge

is without merit as a due process argument as demonstrated previously in this brief. Viewed as an ex post facto argument, it must also fail. Although Art. I, § 10 of the Constitution prohibits ex post facto laws, it does not, by its own terms, apply to judicial decisions. *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982).

With respect to the Contract Clause arguments advanced by Reserve, we find again that Art. I, § 10 of the Constitution limits its application to actions of the legislative authority, not the judiciary. *Frazier v. Lowndes County, Mississippi*, 710 F.2d 1097 (5th Cir. 1983). Any other interpretation of our Constitution would be a radical departure from past precedent, and is not necessary in this case because the facts do not support a finding of any retrospective impairment of Reserve's contract.

CONCLUSION

Reserve Life has failed to set forth sufficient reasons why this Court should devote precious attention to a case in which the facts and record will not support arguments of constitutional magnitude. There is no evidence that the existing judgment for punitive damages inflicted upon Reserve Life was the result of any arbitrary or capricious action of the District Court, or any constitutional infirmity of Mississippi's substantive law.

There is no reason for this Court to suddenly change its direction, evidenced by the recent treatment of cases attempting to pose similar arguments and issues, at this time. This Court should deny the Petition for Writ of Certiorari summarily.

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No. 89-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AETNA CASUALTY AND SURETY COMPANY IN SUPPORT OF PETITIONER

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27 pp

IN THE

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OCTOBER TERM, 1989

No. 89-1303

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE AETNA CASUALTY AND SURETY COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus*, The Aetna Casualty and Surety Company ("Aetna"), hereby moves for leave to file the attached brief *amicus curiae*. Petitioner has granted but respondent has refused to grant consent for Aetna to file a brief *amicus curiae* in support of the petition.

Aetna has been an active participant in efforts to convince the legislatures of the several States to enact

precise, rational controls over their respective punitive damage systems. Aetna also has been the victim of a retrospective federal common law tort of bad faith, created out of whole cloth by a federal district court at the behest of a federal agency. *Aetna Casualty & Surety Co.* v. *FDIC*, No. 89-5866 (6th Cir. argued Feb. 5, 1990). Aetna believes that it is in a position to bring to this Court's attention relevant matters that could not be brought fully to the Court's attention by petitioner and that respondent is unlikely to bring to the Court's attention.

In particular, Aetna brings to the Court's attention in the attached brief information which demonstrates that the enactment of so-called tort "reform" statutes by a number of States since 1986 has done very little to address the arbitrary, standardless and open-ended nature of the punitive damage systems of most jurisdictions. The vast majority of States, including Mississippi, have yet to place any limit on the amount of punitive damages that may be imposed against a defendant in a bad faith (or any other) action. Moreover, none of these statutory enactments prohibit, or attempt to limit in any fashion, the retrospective imposition of punitive damages based upon newly formulated standards of conduct. Aetna believes that the inadequacy of the legislative response to the fundamental defects of state punitive damage systems should be fully understood by the Court as it considers whether to grant review of this case and decide the important due process questions left unresolved in the Court's recent decisions involving federal constitutional challenges to punitive damage awards.

Aetna therefore respectfully requests leave to file the attached brief *amicus curiae*.

March 14, 1990 Respectfully submitted,

/s/ Jane E. Kelly

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QUESTION PRESENTED

In considering whether to grant review in this case, the Court should evaluate the extent to which Mississippi and other States have responded adequately to this Court's suggestions in prior cases that the States ought to act to reform their respective punitive damage regimes that have, over the past decade, led to the imposition of increasingly frequent, larger and essentially unrestricted and unpredictable punitive damage awards. *Amicus curiae* will address the following question:

> Whether the enactment of so-called tort "reform" statutes by a number of States since 1986 should dissuade the Court from addressing the serious constitutional deficiencies in the punitive damage systems of most jurisdictions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1303

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AETNA CASUALTY AND SURETY COMPANY IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

This case concerns the due process limits on the power of judges and juries to impose punitive fines in unpredictable and unrestrained amounts under the punitive damage regimes in place in the several States. Specifically, this case brings before the Court two characteristics of punitive damages that are both common to most jurisdictions and have, by and large, escaped the corrective action of the States since this Court suggested in *Bankers Life and Casualty Co.* v.

Crenshaw, 108 S. Ct. 1645 (1988), that the States take steps to correct abuses in their punitive damage systems.

The first characteristic is that severe punishment is often imposed on defendants for conduct identified as wrongful only after the fact. Because the vast majority of punitive damage awards are imposed for conduct declared wrongful by state courts in their constantly evolving redefinition and expansion of rights and obligations under common law, the opportunity to inflict punishment in the form of punitive damages for conduct not previously declared to warrant punishment arises frequently and is almost as frequently exercised. As Judge Jones put the matter in this case, "neither Reserve Life nor most of the dozens of insurers who have been attacked by this new Mississippi tort have had adequate notice of the conduct that could result in punitive damage awards." Pet. for Cert., App. F, 74a (Jones, J., dissenting from den. of Sugg. for Reh. *En Banc*).

The second characteristic of the punitive damage "system" that "mocks our notions of fundamental fairness," *id.*, is that judges and juries have, with few exceptions, virtually unfettered discretion over the amount of punitive damages to award.

Amicus curiae, The Aetna Casualty and Surety Company ("Aetna"), has been an active participant in efforts to convince the legislatures of the several States to enact precise, rational controls over their respective punitive damage systems. Aetna also has been the victim of a retrospective federal common law tort of bad faith, created out of whole cloth by a federal district court at the behest of a federal agency. *Aetna Casualty & Surety Co.* v. *FDIC*, No.

89-5866 (6th Cir. argued Feb. 5, 1990). Aetna believes that it is in a position to bring to this Court's attention relevant matters that could not be brought fully to the Court's attention by petitioner and that respondent is unlikely to bring to the Court's attention.[1]

STATEMENT OF THE CASE

This case presents the question left for another day in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989): Whether the Due Process Clause of the Fourteenth Amendment acts as a check on the fact-finder's unrestrained discretion to award punitive damages in the absence of an express statutory limit. This case also presents the question whether due process permits the imposition of such unrestrained punishment for conduct not declared punishable when it occurred. Because Mississippi statutory and common law place no limit on the amount of punitive damages that may be imposed against a defendant in a bad faith (or any other) action, the punitive damage award in this case is the product of an arbitrary civil punishment system that typifies in most respects the punitive damage systems presently in place in most jurisdictions in the Nation. This case is also typical of many cases in many jurisdictions in which defendants suffer civil punishment for conduct that has not been declared to be punishable until after that conduct has occurred. Therefore, petitioner's Due Process Clause challenge

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[1] Petitioner granted consent for the filing of this brief *amicus curiae* by a letter on file with the Clerk. Respondent, however, refused to consent. Thus, this brief is accompanied by a motion for leave to file pursuant to Rule 37.2.

to the $500,000 punitive damage award raises important issues that are clearly worthy of this Court's review.

SUMMARY OF ARGUMENT

Defenders of the punitive damage systems in place in most jurisdictions have attempted to dissuade this Court from addressing the constitutional implications of those systems on the ground, *inter alia*, that the legislatures of many States are acting to alleviate the more capricious characteristics of these systems. Typically, the recipients of such windfall awards tell the Court that "at least 15 states have enacted legislation addressing punitive awards, some very recently" and ask the Court to infer from such vague assertions that its intervention would be "premature." *Browning-Ferris, supra*, Br. of Resp. in Opp., at 24-25.

As even a cursory examination of recent state legislative activity in this area reveals, however, one of the effects of this legislative activity has been to entrench more firmly the very flaws that have been of greatest concern to this Court. For example, tort reform statutes such as those enacted in Alabama in 1987 and Nevada in 1989 are so riddled with exceptions and uncertainty that they are virtually meaningless except as they provide legislative imprimaturs on punitive damage systems that continue to place unbridled power in juries and judges to punish defendants whose views, status or actions may be unpopular in general or in a particular case. And what the legislatures may enact may also be repealed, as illustrated by the recent action of the Montana legislature in repealing its then newly enacted limit on punitive damage awards.

Although often well-intentioned, most of the legislative activity in this area in the past four years has not done nearly enough to address the underlying features of the punitive damage systems that daily threaten to undermine the stability of contracts and fundamental economic relations. This Court, as it did in *Browning-Ferris*, should continue in this case its examination of the constitutional defects in the punitive damage regimes of Mississippi and other States because those defects have not been and are not likely to be cured by the States.

ARGUMENT

A. Introduction

The Court first suggested in 1986 that the imposition of unlimited punitive damages for ill-defined or previously undefined conduct raises "important" due process questions. *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Two years later in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), the Court declined to decide those questions, in part to avoid prematurely foreclosing "possibly more appropriate resolutions" of these serious problems. *Id.*, at 1651. The Court in *Bankers Life* suggested that state legislatures might choose to enact statutory limits and other meaningful controls on punitive damages. *Id.*, & n.3.

Despite the Court's expressions of concern over the lack of legislatively established standards governing the imposition of punitive damages, Mississippi, like the vast majority of States, has failed to establish fixed standards that provide fair warning to defendants of the maximum punishment to which they might be subjected for particular misconduct. In most

instances juries and judges remain free to impose punitive damages "guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). Juries and judges continue to have "discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state." *Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part).

Since 1986, at least twenty-six States have enacted legislation relating to punitive damages. Only three of those States, however, have placed limits on the size of such awards in all cases. As discussed below, a few States, like Alabama, have established a maximum punitive fine for some types of cases (usually non-intentional tort cases), but have excluded from such maxima entire classes of cases in which juries and judges frequently impose excessively large punitive damage awards. In these latter classes of cases it remains that "[punitive] damages are the direct product of the ancient theory of unlimited jury discretion . . . ." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

The concerns expressed in *Aetna*, *Bankers Life* and *Browning-Ferris* regarding the important constitutional implications of these systems have largely gone and continue to go unheeded by state legislatures. For example, in February 1990, the Pennsylvania legislature passed and its Governor signed into law H.B. 121, § 3 of which authorizes "bad faith" actions and the imposition of unlimited punitive damages based upon a finding that an insurer "has acted in bad faith." *Pa. H.B.* 121, § 3, *amending Pa. Code*, ch. 83, tit. 42 (signed Feb. 7, 1990) (adding § 8371). That

legislation does not even purport to define the term "bad faith," which has heretofore not been defined by the Pennsylvania courts because those courts have refused to recognize a right of action for "bad faith." *See, e.g., D'Ambrosio* v. *Pennsylvania National Mutual Casualty Insurance Co.*, 431 A.2d 966 (Pa. 1981). The need for this Court to intervene is manifest.

B. Post-1986 Punitive Damage Legislation Has Generally Not Included Express Statutory Limits on the Size of Punitive Damage Awards

In most States that permitted the recovery of punitive damages as of 1983, the discretion of juries and judges was not proscribed by legislatively established limits on the amount of punishment that could be imposed. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269-79, 298-99, 314 (1983). Recent state legislation has produced few explicit, fixed limits on this otherwise unlimited discretion to administer civil punishment in the form of punitive damages. Defendants in the overwhelming number of punitive damage cases as petitioner in the case at bar, remain unprotected from arbitrary, unlimited and excessive punishments.

1. Legislation Applicable to All Punitive Damage Cases

Since 1986, Virginia's $350,000 limit on punitive damage awards in any action "accruing on or after July 1, 1988," *Va. Code Ann.* § 8.01-38.1 (Supp. 1988), is the only state enactment to establish a fixed dollar amount limit on punitive damage awards in all cases.

Although both Colorado and Kansas recently enacted provisions that establish *post hoc* "limits" on the size of the award, those "limits" do not enable defendants to ascertain *in advance* the amount of pun-

ishment to which they might be subjected. The Colorado legislation limits punitive damages to the amount of the compensatory award (or three times that amount if the misconduct continued during the trial). *Colo. Rev. Stat.* § 13-21-102 (1987). But in Colorado, as in most States, juries have virtually unlimited discretion to determine the amount of compensatory damages to be awarded. *See, e.g., Smith* v. *Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of actual damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.").

Similarly, the Kansas statute, *Kan. Stat. Ann.* § 60-3701(e) (Supp. 1988), prohibits the assessment of punitive damage awards in excess of the lesser of defendant's highest gross annual income during the five-year period preceding the misconduct, or $5,000,000. This statute paints with an extraordinarily broad brush, drawing no distinctions among the many types of conduct that might warrant punitive damages and the varying levels of punishment that would rationally be required to achieve the State's objectives of retribution and deterrence in diverse types of situations. Instead, the Kansas statute exposes persons to levels of punishment based upon their financial positions. Furthermore, if a Kansas court finds that the profitability of a defendant's misconduct exceeds or will exceed that amount, it may impose punitive damages up to 150% of the amount of a defendant's profit. *Id.*, § 60-3701(f).[2]

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[2] In 1986, New Hampshire statutorily prohibited the award of punitive damages in all actions "unless otherwise provided by statute." *N.H. Rev. Stat. Ann.* § 507:16 (Supp. 1988). However,

2. Legislation Expressly Excluding Certain Types of Cases from Statutory Limits

The $250,000 ceiling on punitive damages enacted by Alabama in 1987 does not apply to a wide array of cases—wrongful death cases, cases involving a pattern or practice of intentional conduct, cases involving "actual malice," and cases involving defamation, libel or slander. *See Ala. Code* § 6-11-21 & § 6-11-24, § 6-11-29 (Supp. 1988). In such cases, juries retain discretion to award punitive damages in any amount.

The limits established by Nevada Assembly Bill 307, which became effective on May 30, 1989, and which is now codified at *Nev. Rev. Stat.* 42.005, are similarly eviscerated by exceptions. That legislation provides that punitive damages may not exceed three times the amount of compensatory damages[3] if the amount of compensatory damages is $100,000 or more, or $300,000 if the compensatory damage award is less than $100,000. These limits are expressly inapplicable to two types of tort cases in which punitive damage awards are assessed with perhaps the greatest frequency and in the highest amounts—actions brought against a "manufacturer, distributor or seller of a

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prior to their abolition, "punitive" damages in New Hampshire had been regarded as serving a compensatory, rather than punitive, function. *See* K. Redden, *Punitive Damages* § 5.2(A)(29) (1980).

[3] As in Colorado, Nevada juries have extremely broad discretion to determine the amount of compensatory damages. *See, e.g., Miller* v. *Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.").

defective product" and as in the case at bar, an "insurer who acts in bad faith regarding its obligations to provide insurance coverage." Moreover, like Alabama, Nevada chose to exempt punitive damage awards in defamation actions. Environmental or other "toxic tort" cases are likewise excluded.

Similarly, the Georgia legislature in 1987 passed legislation that fixes a $250,000 limit on the size of punitive damage awards only in some non-intentional tort cases. *Ga. Code Ann.* § 51-12-5.1(g) (Supp. 1989). But this section expressly codified the common law rule that "[i]n a tort case in which the cause of action arises from *product liability, there shall be no limitation* regarding the *amount* which may be awarded as punitive damages." *Ga. Code Ann.* § 51-12-5.1(e)(1) (Supp. 1989) (emphasis added).[4] That legislation also exempts cases in which the defendant acted "with the specific intent to cause harm . . . . " *Ga. Code Ann.* § 51-12-5.1(f) (Supp. 1989).

Texas preserved the rule of unlimited punitive damages in its 1987 punitive damage legislation in cases involving intentional misconduct. Section 41.007 of the *Texas Civil Practice and Remedies Code* limits punitive damages to four times the compensatory award, or $200,000 (whichever is greater) *only* in cases in which gross negligence is the predicate for the punitive damage award. *Tex. Civ. Prac. & Rem. Code*

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[4] This provision allows recovery of only one punitive damage award in the courts of Georgia against a product liability defendant "for any act or omission" even if such conduct gave rise to multiple causes of action. *Id. See also Mo. Ann. Stat.* § 510.263(4) (Vernon Supp. 1989) (allowing defendant to seek "credit" for previously paid awards arising out of same conduct). Nonetheless, the amount of that single award is unlimited.

Ann. § 41.007 (Vernon Supp. 1989). In cases in which liability is based on an intentional tort, or "malice,"[5] punitive damages can be awarded in any amount. *Id.*, § 41.008.[6]

3. Legislation Establishing Limits That Can Be Avoided by a Showing of Clear and Convincing Evidence

As part of its general "tort reform" legislation, the Florida legislature in 1986 enacted *Fla. Stat. Ann.* § 768.73 (West Supp. 1989), which, *inter alia*, created a rebuttable presumption that an award of punitive damages that exceeds three times the amount of the compensatory damage award is "excessive," but did not establish a maximum limit on the size of punitive damage awards. *Fla. Stat. Ann.* § 768.73(1)(a)-(b) (West Supp. 1989). The jury is not informed of this presumption, and the jury's discretion to impose pu-

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[5] *Tex. Civ. Prac. & Rem. Code Ann.* § 41.001 broadly defines the term "malice" to include specific intent to cause injury as well as knowingly dangerous "flagrant disregard for the rights of others . . . ."

[6] A number of States have prohibited altogether the award of punitive damages in certain kinds of cases. *See, e.g., Ill. Ann. Stat.* ch. 110, ¶ 2-1115 (Smith-Hurd Supp. 1989) (medical malpractice); *Ore. Rev. Stat.* § 18.550 (1987) (actions against "health practitioners"). In addition, several have established a defense to punitive damages in product liability cases if the drug manufacturer complied with requirements of the Food and Drug Administration. *See, e.g, Tex. Civ. Prac. & Rem. Code Ann.* § 81.003 (Vernon Supp. 1989); *Ore. Rev. Stat.* § 30.927 (1987). On December 13, 1989, the Governor of Texas signed into law S.B. 1, § 10.42 of which limits punitive damage awards in "bad faith" workers' compensation cases to $250,000, or four times actual damages, whichever is greater. Connecticut has limited the amount of punitive damages to twice the compensatory damage award in product liability cases. *Conn. Gen. Stat.* § 52-240(b) (Supp. 1989).

nitive damages in the first instance is therefore not limited or constrained in any way. However, if the jury returns a punitive damage award that exceeds three times the amount of the compensatory damage award, the amount awarded may stand if "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *Id.*, § 768.73(1)(b). This new legislation thus merely shifts and increases the burden of proof on the issue of excessiveness.

Title 23, § 9 (West 1987) of the *Oklahoma Statutes Annotated* provides that punitive damages may not exceed "the amount of actual damages awarded." However, this "percentage limitation on such damages . . . shall not apply" if "there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed . . . ." Thus, upon a "clear and convincing" showing plaintiffs in Oklahoma may seek, and judges and juries may impose, punitive damages in virtually any amount.

4. Legislation Removing Express Statutory Limits

In 1987, the State of Montana amended *Mont. Code Ann.* § 27-1-221 (1987), and reinstated the rule of unlimited punitive damages in all cases, which it had restricted only two years before to $25,000 or 1% of the defendant's net worth in cases not involving "actual fraud or actual malice."

5. Legislation Requiring That a Portion of the Award Be Paid to the State

Implicitly recognizing that punitive damages are imposed by governments for governmental purposes and

are intended to redress public wrongs rather than private injuries, a number of recently enacted statutes require that a portion of punitive damage awards be paid to the State. *See generally Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated."). While in theory these statutes may reduce the amount of a particular private plaintiff's windfall recovery of punitive damages, they do nothing to constrain the discretion of juries or courts to impose punitive damages in unlimited amounts. Indeed, in the absence of statutory limits, it is plausible to assume that juries may return even greater punitive damage awards in order to grant both a substantial windfall to plaintiffs and to fill their government's coffers with funds adequate to have an impact on their own tax bills.

At least seven States, Colorado, Florida, Georgia, Iowa, Missouri, Oregon, and Utah, now require that some portion of punitive damage awards (usually after deducting costs and attorneys' fees) be paid into a state fund. For example, the Florida statute requires that 60% of each punitive damage award imposed in a personal injury or wrongful death case be paid to the Public Medical Assistance Trust Fund and, in all other cases, to the State's General Reserve Fund. *Fla. Stat. Ann.* § 768.73(2) (West Supp. 1989). Similarly, in Georgia 75% of any punitive damage award must "be paid into the treasury of the state . . . ." *Ga. Code Ann.* § 51-12-5.1(e)(2) (Supp. 1989).[7]

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[7] *See also Colo. Rev. Stat.* § 13-21-102(4) (1987) (one-third of

Although these States have chosen to redirect a portion of the substantial sums awarded to punitive damage plaintiffs, these "reforms" exacerbate rather than resolve the troublesome constitutional problems raised by punitive damages. *See, e.g., Browning-Ferris*, 109 S. Ct., at 2914 & 2920 n.21 (leaving open the question whether the Excessive Fines Clause of the Eighth Amendment applies if a governmental entity prosecutes a claim for punitive damages or shares in an award of damages exacted for purposes of punishment); *id.*, at 2932-33 (O'Connor, J., concurring in part and dissenting in part) ("by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity") (citing *Fla. Stat. Ann.* § 768.73(2)(b)).

C. The Punitive Damage Systems in Virtually All Jurisdictions Remain Fundamentally Unfair and Violative of the Due Process Clause

Statutory reforms to the Nation's punitive damage systems have made largely inconsequential inroads

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all reasonable punitive damages collected "shall be paid to the state general fund"); *Iowa Code Ann.* § 668A.1(2)(b) (West 1987) (if defendant's conduct was not specifically directed at the plaintiff, 75% of the punitive damage award goes to state civil reparations trust fund); *Mo. Ann. Stat.* § 537.675 (Vernon 1988) (50% of any final judgment awarding punitive damages deemed "rendered in favor of the state of Missouri"); *Ore. Rev. Stat.* § 18.540 (1987) (50% of punitive damage award "shall be paid to the Criminal Injuries Compensation Account"); *Utah Code Ann.* § 78-18-1(3) (Supp. 1989) (50% of any amount of punitive damages exceeding $20,000 must be "remitted to the state treasurer for deposit into the General Fund").

into the traditional province of juries and judges to award punitive damages on an *ad hoc* and subjective basis and have left completely unresolved the due process issues presented in *Aetna, Bankers Life, Browning-Ferris* and the case at bar. For example, several States have altered the rules of pleading with respect to punitive damages. Florida, Idaho, Illinois, Minnesota and North Dakota prohibit the pleading of punitive damages in an original complaint and generally require some sort of showing that there is a reasonable likelihood that the plaintiff will be able to establish a claim for punitive damages.[8] However salutary this change may be, it does not ameliorate the major constitutional problems presented by massive fines that are subjectively administered in unlimited amounts.

The "lack of sufficient standards governing punitive damage awards in Alabama" mentioned in *Aetna Life Insurance Co.* v. *Lavoie* as presenting an important due process issue has not been resolved in Alabama or elsewhere. Only six States—Alabama, Kentucky, Montana, California, New Jersey and Texas—have taken *any* legislative action to limit or attempt to define more precisely the conduct which may give rise to punitive damage liability. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 21.22 (1985) (section added March 1989). These attempts to define vague terms such as "malice," "fraud," "reck-

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[8] *Fla. Stat. Ann.* § 768.72 (West Supp. 1989); *Idaho Code* § 6-16-4(2) (1988); *Ill. Ann. Stat.* ch. 110, ¶ 2-604.1 (Smith-Hurd Supp. 1989); *Minn. Stat. Ann.* § 549.191 (West 1988); *N.D. Cent. Code* § 32-03-7 (Supp. 1989). Georgia now requires a specific prayer for punitive damages in the original complaint. *Ga. Code Ann.* § 51-12-5.1(d)(1) (Supp. 1989).

lessness" and "gross negligence" have resulted in standards that remain far from precise. For example, the California legislature in 1987 amended its statutory standards to require that conduct be "despicable" as well as "malicious" and "oppressive" to support punitive damages. *Cal. Civ. Code* § 3294(c) (Deering Supp. 1989). The 1987 Alabama legislation redefined the term "malice" to include, *inter alia*, the "intentional doing of a wrongful act without just cause or excuse . . . [u]nder such circumstances that the law will imply an evil intent," and "fraud" as an intentional misrepresentation "which was gross, oppressive or malicious." *Ala. Code* § 6-11-20(b) (Supp. 1988). But these statutes do little more than add new and highly subjective terms to already vague and subjective standards. And as noted above, the Pennsylvania legislature within the last six weeks authorized the imposition of unlimited punitive damages for insurance "bad faith" without any attempt to explain what conduct might constitute "bad faith" or otherwise to elucidate the scope or impact of its new statute.

Furthermore, these statutes do nothing at all to curb the imposition of punitive damages by state courts for conduct newly identified as worthy of punishment under evolving common law doctrine. *Amicus* is unaware of a single statute forbidding the imposition of punitive damages in the context of announcing such a new standard of conduct—one of the two central evils of the punitive damage system that petitioner asks this Court to review.

Although "punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings."

Smith v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). Since 1986, no State has legislatively adopted a standard of proof requiring that liability for punitive damages be established "beyond a reasonable doubt." Moreover, although a number of States recently have increased the burden of proof in at least some punitive damage cases from "preponderance of the evidence" to "clear and convincing evidence,"[9] two States, Idaho and New Jersey, have expressly codified the preponderance of the evidence standard in punitive damage cases.[10]

Recent punitive damage legislation in several States[11] requires some form of bifurcated trial in which either the claim for compensatory damages is bifurcated from the punitive damage claim or the jury's determination of punitive damage liability precedes its determination of the amount of the award. *Amicus curiae* supports the bifurcation of the compensatory and punitive phases of a trial. However, dividing the jury's assigned tasks into separate phases without placing effective controls on the size of awards leaves with the jury and judge the power to punish with unbridled authority. It appears that only three States, Connecticut, Kansas and Ohio, have placed statutory responsibility for setting the amount of the award solely in the hands of the trial judge

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[9] *See* J. Ghiardi & J. Kircher, *supra*, § 21.13 (listing ten states); *see also Nev. Rev. Stat.* § 42.005.

[10] J. Ghiardi & J. Kircher, *supra*, § 21.13.

[11] *See, e.g., Ga. Code Ann.* § 51-12-5.1 (Supp. 1989); *Nev. Rev. Stat.* § 42.005; *Mo. Ann. Stat.* § 510.263 (Vernon Supp. 1989); *Mont. Code Ann.* § 27-1-221 (1987); *N.J. Stat. Ann.* § 2A:58C-5 (West 1987); *Ohio Rev. Code Ann.* § 2315.21 (Anderson 1988).

once the jury (or judge) determines liability,[12] and the Connecticut provision is only applicable to products liability cases.

CONCLUSION

In the context of a system of punishment in which "responsible officials had deliberated and then agreed" as to "a range of penalties," *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring), the limited reforms of state punitive damage law documented above might be regarded as noteworthy, if inadequate. In the absence of such considered legislative judgments, however, these ancillary measures suggest that state legislatures are not prepared to address and resolve the fundamental defects in the open-ended, common law punitive damage systems that continue to flourish across the Nation. This Court must do so, and the case at bar is an appropriate vehicle for the Court's resolution of these important issues.

March 14, 1990

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[12] *See Kan. Stat. Ann.* § 60-3701(a) (Supp. 1988); *Ohio Rev. Code Ann.* § 2315.21(C)(2) (Anderson 1988); *Conn. Gen. Stat.* § 52-240(b) (Supp. 1989). *Compare ABA Standards for Criminal Justice*, Standard 18-1.1 *Commentary* (2d ed. 1980) (rejecting use of a jury in imposing a punishment in the criminal context).

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RESERVE LIFE INSURANCE COMPANY,
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v.

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Respondent.

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REPLY MEMORANDUM

This reply memorandum is submitted in light of this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991).

As petitioner shall demonstrate below, the case at bar directly draws into question the applicability of the constitutional rule laid down in *Pacific Mutual* to cases in which punitive damages have been imposed for negligent, unintentional and non-malicious conduct. Mississippi's punitive damage system would appear to be *per se* unconstitutional because of the total failure of its courts, *see id.*, slip op., at 17 n.10, to exercise any significant appellate control over the size of punitive damage awards—a failure replicated by the Fifth Circuit panel in this case. This Court should, however, grant this petition to consider: (1) how the *Pacific Mutual* rule should apply to an increasing number of cases in which state courts, departing radically from centuries of Anglo-American jurisprudence, have sustained the imposition of punitive damages for purely negligent conduct; (2) how a federal court of appeals exercising jurisdiction in a diversity case must apply *Pacific Mutual* to a punitive damage award where the diversity State's courts have not adopted constitutionally sufficient procedures to ensure that punitive damage awards are imposed fairly and are not constitutionally excessive; and (3) whether in any event punishment in the form of punitive damages may be imposed retrospectively for violation of legal rules that did not exist at the time the conduct at issue occurred.

1. History is a two-edged sword. When the Fifth Amendment became part of our Constitution in 1791, it was well understood that punitive damages were available only where the conduct to be punished was "of the most atro-

cious and dishonorable nature," *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 91 (1791). Prior to the ratification of the Fourteenth Amendment in 1868, this Court affirmed its understanding that negligence was an insufficient predicate for the imposition of exemplary or punitive damages in civil actions brought by private persons. *See Philadelphia W. & B. R. Co. v. Quigley*, 62 U.S. (21 How.) 202 (1859). And less than a decade after ratification, this Court announced as a federal rule that "gross or ordinary negligence [does] not authorize [a] jury to visit [a defendant] with [punitive damages]." *Milwaukee & St. Paul Ry.* v. *Arms*, 91 U.S. 489, 495 (1876). The commentators of that era agreed. *See* T. Sedgwick, *Measure of Damages* 545 & n.+ (4th ed. 1868) (even fraud insufficient to support punitive damages unless "accompanied by gross malice and manifest design to injure"). Cf. *Pacific Mutual*, slip op., at 4 (Scalia, J., concurring in the judgment) (impracticable to set bounds on jury discretion where conduct of defendant reflects "malicious intent") (quoting T. Sedgwick, *supra*, 537-38 n.1).

In her opposition in this case, respondent candidly acknowledges that this case "does not involve elements of fraud or the various intentional torts . . . for which punitive damages have traditionally been awarded." Opp., at 3. Thus, under this Court's decision in *Pacific Mutual* a substantial question arises whether the procedures adopted by Alabama and other States to control punitive damages are constitutionally sufficient given the overwhelming historical rejection of the imposition of punitive damages on a negligence standard during the 19th Century and, until recently, the 20th Century.[1]

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[1] The imposition of punishment—in civil or criminal proceedings—in the absence of intent or *mens rea* is also generally inconsistent with fundamental and accepted notions of fairness. *See Dennis* v. *United States*, 341 U.S. 494, 500 (1951) (Vinson, C.J.) (plurality opinion) ("The existence of a *mens rea* is the rule of, rather than an exception to, the principles of Anglo-American criminal jurisprudence.") Indeed, as

In addition to Mississippi as a general matter and the Fifth Circuit in this case specifically, at least one State, Alabama, has authorized and expressly upheld an award of punitive damages for simple negligent conduct. *Alabama Power Co.* v. *Turner*, No. 89-408 (Ala. Jan. 11, 1991). Six other States appear to have subscribed to the notion that "gross negligence" is sufficient to sustain a punitive damage award.[2] The Court should act in this case to establish what

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then Judge Blackmun observed in 1960, under this Court's cases the elimination of intent as an element of a criminal offense would offend the due process clause unless, *inter alia*, "the penalty is relatively small . . . ." *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960). *See generally United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("While strict liability offenses . . . do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status.") In *Gypsum*, this Court held intent was an element of the criminal antitrust laws because, *inter alia*, the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Id.*, at 438. As Reserve demonstrates in the Petition, the conduct for which it has been punished was not just ill-defined, it was not defined as punishable conduct at all. More than thirty years after *Holdridge* was decided, Justice Blackmun, writing for this Court, announced that for constitutional purposes punishment administered in a civil proceeding implicates the same constitutional concerns as are implicated by punishment administered after a criminal trial. *United States* v. *Halper*, 109 S. Ct. 1892, 1903 (1989). Thus, it follows that if punitive damages can be imposed at all for negligent conduct, the procedures that must accompany their imposition are necessarily more exacting and the due process limits on their size much greater than in cases in which an evil or malicious intent must be shown.

[2] *See, e.g., Kelsay* v. *Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 359 (1978); *Newton* v. *Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136, 1150 (1978); *Oliver* v. *Martin*, 460 A.2d 594, 595 (Me. 1983); *Mississippi Power Co.* v. *Jones*, 369 So.2d 1381 (Miss. 1979); *Paris* v. *Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 331 S.E.2d 234, *review denied*, 315 N.C. 185 (1985); *Mullins* v. *Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985); *Inland Container Corp.* v. *March*, 529 S.W.2d 43, 45 (Tenn. 1975); *Tex. Civ. Prac. & Rem. Code Ann.* § 41.003 (Vernon 1987 &

procedural constraints are imposed by the Due Process Clause in addition to those articulated in *Pacific Mutual* where state law imposes punitive damages for negligent conduct.

2. As the Court acknowledges in *Pacific Mutual*, the elaborate procedures for strict appellate review in Alabama relied upon to reject a facial challenge to the Alabama punitive damage system have not been adopted or applied by the Mississippi courts, a fact which "distinguishes Alabama's system from the . . . Mississippi scheme[ ] . . . ." Slip op., at 17 n.10. As Judge Jones pointed out below in this case, "Mississippi courts all but refuse to interfere with the amounts of punitive damages assessed by the fact finder." Cert. Pet. App. F, at 78a (Jones, J., dissenting from denial of rehearing *en banc*).

It would thus appear that should this Court grant this petition, vacate the judgment and remand this case to the Fifth Circuit, that court will have little choice but to declare Mississippi's punitive damage system unconstitutional *per se*. This prospect, however, raises an additional question, not addressed in *Pacific Mutual*, as to how federal courts sitting in diversity in punitive damage cases are to implement the rule laid down in *Pacific Mutual*. Should

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Supp. 1991).

This Court has, in the recent past, indulged the assumption that the several States had not set their juries loose to impose punitive damages on a finding of negligence. In *Smith* v. *Wade*, 461 U.S. 30, 43 (1983), the Court noted that the standard of "gross negligence" had also been rejected because "too vague, and too likely to be confused with mere ordinary negligence." *See also International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 61 (1979) ("No court . . . has ever held negligence can form the basis for a proper punitive damage award") (Blackmun, J., concurring); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages available only for "intentional or malicious" misconduct) (Blackmun, J., for the Court). The Court must now deal with the reality facing Reserve and all other punitive damage defendants whose negligent conduct has been or may be punished by punitive damages because some States have jettisoned the centuries-old rule to the contrary.

the federal courts of appeals strike down facially inadequate state schemes such as Mississippi's, or should they instead fashion their own constitutionally adequate procedures? (Such procedures could ostensibly be fashioned under authority that might appropriately be characterized as a power to fashion rules of federal constitutional common law derived from the *Pacific Mutual* rule.) This case is an appropriate vehicle for the Court to address and resolve this question before the lower federal courts descend into chaos on the issue.

3. *Pacific Mutual* does not, of course, address Question 2 presented by Reserve involving the constitutionality under the Due Process and Contracts Clauses of the retrospective imposition of punitive damages under a substantive standard of conduct that did not exist at the time the conduct at issue occurred. Because it is impossible to form an intent to violate a non-existent legal duty, Question 2 fairly subsumes both the procedural question discussed in part 1 above and the underlying question whether any array of procedures would serve to permit the retrospective imposition of punitive damages. As Reserve demonstrates in the Petition, at 23-30, this is an important and frequently recurring question upon which the Court's guidance is urgently needed.

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Respectfully submitted,

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